

REFUGEE LAW AND STATES' OBLIGATIONS

Jessica Katrine Walker

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Refugee Law and States' Obligations

Jessica Katrine Walker

M.Phil (Philosophy)



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Abstract

The current legal definition of the term ‘refugee’ fails to recognise the centrality of refugees’ hardship and in doing so draws morally arbitrary distinctions between different types of refugees. I use Wiggins’ 1987 paper to give us reason to think that hardship ought to be central to morality. From here I make hardship the core of a modified legal definition of the term ‘refugee’. Then I explore moral obligations that states have to refugees in virtue of their hardship. First, I ask whom states are obligated to and show that the only morally relevant distinguishing feature between refugees is the ‘level’ of hardship they experience. Second, I ask what kinds of moral and legal obligations states have to refugees. I argue that states’ moral obligations to ‘give refuge’ are perfect duties and that states’ legal obligations differ for different types of refugees.

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Introduction

Refugee concerns are of paramount importance in the global ethical sphere at present. The number of refugees in the world has risen from 16.6 million in 2013 to 19.5 in 2014 (UNHCR, 2014). As such, this is a global issue that is becoming increasingly pressing. According to the UN High Commissioner for Refugees: “The refugee phenomenon is one of truly global proportions, affecting not only millions of marginalized people directly but also the policies and practices of virtually every government in the world” (UNHCR, 2015). As refugee concerns are of increasing importance in the current climate, I have chosen to devote this paper to addressing this contemporary global ethical issue from a philosophical perspective.

In this paper I will examine the current legal approach to refugees, a proposed alteration and obligations that states have to refugees. I will argue that hardship is at the core of what makes someone a refugee. I will begin by arguing that the current legal definition of the term refugee draws morally arbitrary distinctions. I suggest that focusing on hardship can eliminate these morally arbitrary distinctions (Chapter 1). I argue using Wiggins (1987), Singer (1972) and Anderson (1999) that hardship is morally significant and our definition of ‘refugee’ ought to be based on this (Chapter 2). Focusing on hardship, I justify and then offer a modified morally relevant legal definition (Chapter 3). I then analyse the different obligations that flow from this legal definition (Chapters 4 and 5). I first ask which types of refugees the law obligates signatory states to protect (Chapter 4). I argue that the law currently distinguishes between refugees in three ways according to what I call ‘category’, ‘location’ and ‘level’. I suggest that the law ought only directly differentiate based on level, as it is the only directly morally relevant distinguishing feature. Finally, I ask what *kinds* of obligations flow from this law (Chapter 5). I conclude that some are perfect and others are imperfect duties. I hope that by the end of this I will have shown that the current state of the law should change and which obligations ought to flow from this change.

§1. Definitions

Before progressing I must establish definitions of the terms: ‘migrant’, ‘internally displaced person’ and ‘refugee’. For the moment I will offer very loose, definitions that attempt to capture the way that these terms are used in everyday speech. Later in the paper some of these definitions will be tightened as I analyse their technical legal uses. For now I will define the terms as we use them in common speech. I will go into more detail with the final term (‘refugee’) as it will be the central term discussed throughout this paper.

First, a ‘migrant’ is someone who moves from one country to another. Second, an ‘internally displaced person’ is someone who has to flee their home and move to another area within their country. Reasons for this move could include: a natural disaster that has wiped out their land, or a civil war that makes living in their particular location too dangerous. Third, I posit that the contemporary common speech definition of a ‘refugee’ is someone who flees their country of origin due to some source of hardship, seeking refuge in another country.

One may think that this definition of ‘refugee’ is not an accurate representation of the way that this term is used in common speech. It can be argued that we usually associate the term refugee with notions such as ‘sanctuary’ and ‘asylum’. The etymology of these words would seem to connect them with a narrower definition than I have offered here.

That is, the etymology of ‘sanctuary’ connotes notions of a “sacred place” (from the Late Latin *sanctuarium*) which people are “immune to punishment” (from the 14th century in the time of Constantine) and arrest (Harper, 2016). The etymology of ‘asylum’ comes from the Latin *asylum* meaning “sanctuary” and the Greek *ásylos*, meaning “inviolable, safe from violence” (Harper, 2016). Both of these associated terms can be seen to imply that refugees are limited to those seeking refuge from the “violence” of physical persecution, “punishment” and arrest by a state; as only a state can arrest people and legitimately punish them.

An association with ‘sanctuary’ and ‘asylum’ and their etymological base can be seen in the *legal definition* of the term ‘refugee’. The legal definition reflects the

persecution focus that can be seen through this association. As such, the legal definition is far narrower than the one I have suggested above. I will explore this difference in detail in Chapter 1.

However, the definition I offer here needs to be broader than the associated terms suggest if it is to capture the *common discourse's* usage of the term, which is what I am aiming to define at this juncture¹. That is, it needs to include cases in which refuge is sought, when it is not limited to cases allowed for by this association with the etymology of 'sanctuary' and 'asylum'.

In common discourse, the term 'refugee' is sometimes associated with seeking refuge from persecution from an arresting body (as these associations imply). However, it is also sometimes associated with seeking refuge from other hardships such as starvation. This can be seen from the fact that the term 'economic refugee' is often used in discourse. 'Economic refugee' is a term used to describe individuals who flee severe economic hardship. In common discourse, though not under the law, they are considered to be a type of refugee. The media refers to both political and economic refugees (Roswell, 2015; Davies, 2013; Wilberforce, 2009:7; Sivanandan, 2000). Furthermore, academic journals refer to economic refugees as a type of refugee (Lakoff and Ferguson, 2006). Economic refugees are not seeking sanctuary/asylum from an arresting body, but they are seeking refuge from starvation.

As such, the common discourse definition of 'refugee' includes individuals who seek refuge from persecution in addition to those who seek refuge from other hardships such as starvation; even though this usage does not match the legal usage. As such, the definition I offered above is in some respects broader than other similar terms might lead us to suppose. Furthermore, it is much broader than its current legal usage. However, this formulation of the definition matches the broader current usage of the term in common discourse.

¹ Furthermore, the etymology of the term 'refugee' is to be derived from the term 'refuge'. 'Refuge' in turn, originates from the Latin *refugium* meaning "taking refuge; place to flee back to" (Harper, 2016). Constituents of this Latin word originate from the Ancient Greek *feugō* meaning "to flee" (Liddel and Scott, 1929). As such, the etymology of 'refugee'/'refuge' is broader than the 'sanctuary' and 'asylum' associations that are echoed in the legal definition.

§2. The Current Refugee Situation

Having established basic definitions of the key terms it is now possible to look at the state of affairs for refugees in the world at the moment. I will now briefly turn to the refugee crises taking place around the world, as they will do much to illustrate why addressing global ethical issues from a philosophical perspective is necessary. Issues surrounding refugees are a focus of political discourse at present. As such, the media attention surrounding the hardship faced by refugees has drastically increased and the question of what to do about them is being asked across the globe. With this in mind, I will pay special attention to the crises in Calais, Greece, Italy, and Australia.

The present crises in Europe are the best place to begin. However, the political and social reality of the events in question is incredibly complex and nuanced. A simplified explanation of what is going on in Europe is that a significant number of refugees are fleeing North Africa², Syria, and Afghanistan through Libya (Scammell, 2015; Day, 2015). They are arriving in Italy and Greece³ (BBC, 2015a), in the hope of moving on through Europe. “Europe’s asylum policies mean that a refugee has to apply for asylum in the country where he or she first arrives, which for those coming from Libya and Turkey almost always means Italy or Greece” (Day, 2105). Italy and Greece are thereby currently experiencing a large volume of refugees seeking access via the Mediterranean (BBC, 2015a). As such, there are numerous reports of refugees being rescued in the Mediterranean by Italian authorities or Greek locals⁴ ((The

² Though many have also fled Eritrea and Somalia to Libya (which are just beyond the border of North Africa), to then travel on to Europe (Scammell, 2015; Day, 2015).

³ NB: Greece also receives a number of refugees moving from Turkey.

⁴ In contrast to Italy Greek rescue efforts come largely from locals because Greek infrastructure is unable to support the number of refugees who have arrived. The police in Greece are struggling to register the number of refugees entering the country. In August 2015, 2,500 refugees were confined to a stadium for approximately 24 hours while the police attempted to process them without sufficient food or water (Kingsley, 2015). There are, however, numerous examples of people taking the crisis into their own hands: retired policeman Thanassis Andreotis collects refugees in their dinghies as they attempt to cross the Mediterranean from Turkey (Kingsley, 2015a). Furthermore, Melinda McRostie runs a makeshift camp on the land at the back of her restaurant. She feeds the migrants with food largely donated by locals and tourists (Kingsley, 2015a).

Guardian, Associated Press in Rome, 2015; Kingsley, 2015a; Day, 2015, Kingsley, 2015b).

In Italy, “A total of 170,000 migrants and asylum seekers were rescued at sea by Italy’s coast guard, navy and other vessels including cargo ships last year. It is believed the tally will be higher this year” (The Guardian, Associated Press in Rome, 2015). The total for this year surpassed 50,000 on June 6th (Scammell, 2015).

Greece receives a smaller percentage of Europe’s refugees than Italy, though it is still a significant proportion. “At least 61,474 refugees arrived on the Greek islands between 1 January and 22 June 2015 – far more than during the whole of 2014 (43,500). The number of arrivals are increasing, with an average of more than 5,000 per week arriving in the first three weeks of June” (Amnesty International, 2015). “Local officials and aid experts estimate that 200,000 refugees will come to Greece this year. This will undoubtedly overwhelm the primarily local-led relief efforts” (Day, 2015).

Closer to home, there are worries in the UK about an influx of refugees who are crossing, or trying to cross, the English Channel (largely via the Chunnel) from Calais. “Thousands of migrants who are camped in Calais are attempting to reach the UK by crossing the Channel” and “[t]he British and French governments are coming under increasing pressure to deal with the migrant crisis in Calais” (BBC, 2015a). Despite some ambivalence amongst the British populace and in a government which has been somewhat slow to react, the refugees have an active solidarity in the press (CMS, 2015a; CMS, 2015b; CMS, 2015c).

In order to understand the scale of the situation in France and the UK, it is necessary to consider some figures. First, the company that operates the channel tunnel (Eurotunnel) states that it has prevented 37,000 attempts to cross the channel through the tunnel since January (BBC, 2015a). Furthermore, the combined efforts of French authorities and the UK Border Force interfered with 39,000 attempts to cross the channel in 2014/15; a number that is more than double the figure from the previous year (BBC, 2015a). Current estimates suggest that there are approximately 3,000 people living in the Calais camps at present (BBC, 2015a). As such, the unofficial

Calais camp deals with far fewer numbers than Italy or Greece. However, it is much closer to home and therefore receives significant media coverage in the UK.

Meanwhile, the refugee situation that occurred in Australia under Prime Minister Tony Abbott⁵ is infamous. In 2001, under the original formulation of the Pacific Solution⁶, developed by the Howard government, Australia removed territorial control from islands surrounding its perimeter so that if refugees landed on them, they had not yet reached Australian soil (see Australian Parliament, 2004). Then the Australian Defence Force was deployed to turn refugee vessels around and divert them to various complicit Pacific islands (Phillips, 2012). Building on Howard's original policy, Abbott still sends refugee vessels to the islands of Nauru and Manus for processing and sometimes resettlement⁷ if their claims prove legitimate. However, refugees being held on Nauru are now being given the option to resettle in Cambodia (Farrell and Crothers, 2015a; Farrell and Crothers, 2015b); though it appears that this option is no longer available (Murdoch, 2015). The upshot of this policy is that Australia pays these Pacific countries, effectively in aid money, to take on their refugee obligations.⁸

Australia's refugee policy and its consequences have also received international media attention (BBC, 2014; BBC, 2015b; Hasham, 2015 (SMH); Conifer, 2015 (ABC)). This is partly as a result of the policy itself, Australia side-steps its obligations under the UN *Convention Relating to the Status of Refugees (1951)*, and partly because of the antagonist rhetoric of Abbott, which can only be described as xenophobic. For example, Abbott declared: "you don't migrate to this country unless you want to join our team... team Australia" (Cox, 2014). Furthermore, in relation to

⁵ As of the 14th of September, 2015 Tony Abbott is no longer the Prime Minister of Australia. Malcolm Turnbull has succeeded.

⁶ In outline, the Pacific Solution is a policy whereby asylum seekers are processed off shore in various islands/countries in the Pacific Ocean. It began with Nauru and Manus. Over the years other locations were considered

⁷ Refugees are currently resettled on Manus and Nauru, and in Cambodia and, in small numbers, Australia.

⁸ It is important to note that these policies have been in the works for over a decade. Abbott's policies are the latest manifestation of Howard's Pacific Solution. Gillard considered Malaysia (which was disallowed by the High Court) and East Timor. Australia also had a brief spell of onshore processing again in Nov 2012

allegations of torture in the Manus Island detention centre, Abbott said, at a press conference in the state of Western Australia, “I really think Australians are sick of being lectured to by the United Nations, particularly given that we have stopped the boats, and by stopping the boats, we have ended the deaths at sea”(Stone, 2015). Such remarks illustrate the seriousness of the situation that is occurring in Australia and draw attention to the necessarily philosophical work with which this paper is concerned.

There are many other immigration situations in different parts of the globe worth discussing: refugees fleeing Cuba (Turck, 2014) and South America (Gonzalez-Barrera and Krogstad, 2015; Markson, 2015) more broadly into the US, refugees fleeing Afghanistan into Pakistan and Iran (Torkham, 2015; Ullah, 2015), refugees fleeing Myanmar for Indonesia (Graham-Harrison, 2015). For a full list of refugee situations across the globe see the CIA Factbook (CIA, 2015). This Factbook outlines each country’s number of refugees and internally displaced persons and their reasons for moving.⁹ There are more refugee situations across the globe than it is possible to discuss in an introduction to a philosophy paper. However, I hope, from this brief description, it is apparent that this is a topical and relevant contemporary global ethical problem. Working out the ethical stance on this issue is of both practical and philosophical import.

These political and legal issues raise many philosophical questions. Various philosophical issues come into play when refugee issues are discussed: cosmopolitan ethics, the moral arbitrariness of borders, what citizenship entails, international law and its capacity for implementation, how terms ought to be defined within the law, the strength of state sovereignty and obligations of state to members and non-members. I have chosen to focus on philosophical issues that stem from analysis of the international law that pertains to refugees and the obligations this law places on states.

⁹ NB: Although this source gives a good introduction to many of the refugee situations around the world, its figures are not always consistent with UN figures. As such, it should be perused with caution.

§3. Refugee Law and its History

As my paper will be focused on the legal treatment of refugee concerns in international law, I will now give a brief historical account of international law pertaining to refugees and highlight the key documents that will be used throughout this paper.

I will begin with the history. The first international convention relating to refugee concerns was drafted after WWI. Essentially, many people had fled their homes during and after the war.¹⁰ As a result, in 1933 the *Convention Relating to the International Status of Refugees* was created (Jaeger, 2001:730). It formed the groundwork for the 1951 Convention that we now use today (Jaeger, 2001:730).¹¹

During and after WWII, the number of displaced people increased dramatically. The United Nations, which replaced the League of Nations, developed a convention to deal with the vast number of internationally displaced persons. This convention was called the *Convention Relating to the Status of Refugees* (1951). It articulated the criteria for refugee status and outlined the kinds of legal protection and other assistance refugees could expect (UNHCR, 2011:1). This convention was followed by an amending protocol in 1967 called the *Protocol Relating to the Status of Refugees*. This Convention and Protocol remain the primary legislation relating to refugees (UNHCR, 2011:1). In fact these are the sole “global legal instrument” addressing the “status and rights of refugees” (UNHCR, 2011:5)¹²

¹⁰ It was not only WWI, but also “the wars in the Caucasus, 1918-1921, and the Greco-Turkish War, 1919-1922”, which caused the significant number of refugees in the period. Most of the refugees at the time came from Russia (Jaeger, 2001:727).

¹¹ It is worth noting, however, that the definition of ‘refugee’ on which the League of Nations legislation depends appears in the “Arrangement of May 12, 1926 Relating to the Issue of Identity Certificates to Russian and Armenian Refugees”(League of Nations, 2015).

¹² There are regional agreements that supplement the convention and protocol (for example: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) pertaining to Africa (UNHCR); the Cartagena Declaration on Refugees (1984) pertaining to Latin America (UNHCR); and the Common European Asylum System (European Commission, 2015)) and “there is also a substantial body of international human rights law that complements the rights of refugees in the 1951 Convention. States are already committed to protecting the human rights of refugees through their human rights obligations, not least the right to live in security and with dignity” (UNHCR, 2011:5).

I have chosen to focus on refugee concerns at a global level. As such, the 1951 convention and 1967 protocol will form the legal focus of my paper. These laws taken together serve to define the term ‘refugee’ and to set out the obligations signatory states have to refugees. The Convention defines a refugee as:

“a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution (see Article 1A(2)).” (UNHCR, 2011:3).

States are obligated to protect individuals who fall under this definition. This definition will be analysed in detail in the following chapter. For now I will offer an outline of what I will be arguing in each of the five chapters of this dissertation.

§4. Chapter Summary

In *Chapter 1* I look at the current definition of the term ‘refugee’ in the law. I argue that this definition draws certain morally arbitrary distinctions between different types of refugees. I motivate the idea that the morally salient feature of “being a refugee” is that a person experiences a significant level of hardship, rather than what causes the hardship.

In *Chapter 2* I offer more concrete reasons to believe that hardship is morally significant. I draw on Wiggins (1987) to argue that social moralities must consider severe hardship that undermines basic human needs to be morally significant. From there I compare Singer’s (1972, 1993) and Anderson’s (1999), modes of thinking about how the moral significance of hardship is to be understood. I argue that Wiggins’ insight should lead to a non-consequentialist account of how the moral significance of hardship is to be understood. This is because the consequentialist

However, the 1951 Convention and the 1967 Protocol are the only *global* legal documents protecting the “status and rights of refugees” (UNHCR, 2011:5).

approach is vulnerable to the separateness of persons objection and thereby is incompatible with rights and human dignity.

In *Chapter 3* I propose changes to the legal definition of ‘refugee’. First, I show that moral considerations belong in a discussion of refugee law. I then formulate a moral definition of the term ‘refugee’ that adequately responds to the moral significance of hardship. Then I introduce the sentiment of this moral definition to the current legal definition. Finally, I defend this modified legal definition against potential criticisms and conclude that the definition can withstand these criticisms.

In *Chapter 4* I begin my two-part exploration of states’ moral obligations to refugees that flow from the modified definition. Here I examine who states are obligated to as a result of this definition. I explore the various ways of separating different types of refugees. I argue that the law currently distinguishes between refugees in three ways, pertaining to what I call: ‘category’, ‘location’ and ‘level’. Briefly, category refers to the cause of the refugee’s hardship – that is, whether they are political or economic refugees. Location refers to the geographical location from which the refugee’s claim for refuge was made; if it was at the destination country’s doorstep, then they are an asylum seeker, if it was made from a third party refugee camp, then they are a refugee seeking resettlement; finally, level refers to the intensity of hardship experienced and the risk associated with repatriation. I argue that the law ought only directly differentiate based on level as it is the only morally relevant distinguishing feature.

In *Chapter 5* I explore states’ moral and legal obligations to give refuge to refugees. I ask what kinds of obligation these are. I begin with the moral obligation and explore various answers to this question. Some believe states’ moral obligations to give refuge are not in fact obligations at all. They are merely supererogatory; it would be commendable if we did help refugees but it would not be wrong of us if we did not. Others believe we do have obligations and that these obligations are imperfect duties. Still others believe we have perfect duties to refugees. I will argue that states’ moral obligation to give refuge is a perfect duty that is claimable against states collectively. I then consider states’ legal obligation to give refuge. I ask what kind of obligation this is. Here I argue that states have a perfect duty to give refuge to asylum seekers, an imperfect duty to refugees seeking resettlement and they have no duty at all to

internally displaced persons or individuals who have not moved from their site of hardship. I conclude that there is a large gap between the kinds of moral obligations states have and the kinds of obligations that are currently required of under the law.

After exploring these ideas, I will conclude that: the core of the definition of refugees and states' obligations towards them is hardship. The current legal definition fails to recognise this and in doing so draws morally arbitrary distinctions between different types of refugees. Wiggins gives us reason to think that hardship ought to be central to morality. As such, I make it the core of a modified legal definition of the term 'refugee'. Then I explore moral obligations that states have to refugees in virtue of their hardship. First, I ask whom states are obligated to and show that the only morally relevant distinguishing feature between refugees is the level of hardship they are in. Second, I ask what kinds of moral and legal obligations are states' obligations to give refuge to refugees. I argue that states' moral obligations to give refuge are perfect duties. States' legal obligations differ for different types of refugees. I conclude that there is a significant gap between the kinds of moral and legal obligations states have to refugees to give refuge. In the concluding remarks of this paper I summarise the contents of the paper and flag an area for future research pertaining to a second obligation on the part of states to refugees.

Chapter 1: Legal Definition

In this chapter I will analyse the current state of international law pertaining to refugees. I will outline the legal definition of the term (§1) and explain how this definition works (§2). Then I will explore four ways in which the current definition is too narrow. I will argue that it is too narrow to capture a morally relevant definition of a refugee (§3). This could be overcome if lawmakers recognized that the defining factor in being a refugee is not the narrow question of whether a person is being persecuted or not. In place of this I will begin to motivate the idea that level of hardship ought to be central to the legal definition of the term ‘refugee’.

§1. The Legal Definition Outlined

I will begin by outlining the legal definition. The legal definition of a refugee is set out in the Geneva Convention on the Status of Refugees, UN, 1951. A refugee is defined as a person who:

“As a result of events¹³ occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality¹⁴ and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (CSR 1951, Article 1(2)).¹⁵

¹³ The convention allows for “events” to be interpreted in two different ways (CSR, 1951, Article 1(B(1))). Either admissible events are confined to Europe, or they extend beyond European soil. Either way, they must occur before 1951.

¹⁴ If an individual is a dual national, their “country of nationality” refers to both of the countries that they are nationals of. The implication of this is that they must look for protection in both of their countries of nationality before they can count as a refugee (CSR, 1951, Article 1(A(2))).

¹⁵ It is important to note that I omitted the clause of Article 1(B(2)) that stipulates that a person is only a refugee if they fit the criteria above “As a result of events occurring before 1 January 1951” (CSR 1951, Article 1(B(2))). I omitted this from the definition above, as the 1967 Protocol broadened the definition so that it would allow people who experienced persecution as a result of any event to count

§2. Explaining the Definition

The crux of this definition is that someone can only count as a refugee if they fulfill certain criteria:

First, the persecution mentioned covered by the convention must be the “result of events occurring before 1 January 1951”. If the same kind of persecution results from events after 1 January 1951, then the individual does not fulfill the criteria and cannot fall under the definition of a refugee.

Second, they must have a “well-founded fear of being persecuted”. To be clear, then, there are three significant factors to satisfying this criteria: a person must have a fear, it must be well founded, and it must pertain to the presence, or likely presence of persecution. In other words, to qualify as a refugee, a person must have a concern, which is legitimate in the eyes of the law, that they will face persecution.

Third, the persecution must result from “reasons of race, religion, nationality, membership of a particular social group or political opinion”. In this way, the convention specifies the causes of persecution that can lead one to count as a refugee. The causes listed are typically seen as “group-based” causes, meaning the persecution mentioned by the convention is caused by membership to a specific kind of group. For example, a particular race, religion, nationality, social group or group holding a particular political opinion.¹⁶

Fourth, the individual must be “outside” of his country of “nationality” or “former habitual residence” and be “unable or, owing to such fear, [be] unwilling to avail himself of the protection of that country” or be “unwilling to return to it” if he is to qualify as a refugee. This means that the individual cannot fall under the definition if he or she is still in the country in which the hardship is occurring or is likely to occur.

as refugees. That is, it did not limited refugees to those who experienced hardship as a result of events occurring before 1 January 1951.

¹⁶ It is important to note that holding a political opinion may be a group-based cause, if the opinion is held by others. However, it may also be an individual cause if they view is distinctive to an individual.

Furthermore, the definition actively distinguishes between nationals, and habitual residents. The distinction does not seem to result in different requirements for the national and the habitual resident in practice, despite the different wording. Nationals need to be: “unable or, owing to such fear, is unwilling to avail himself of the protection of that country”, whilst habitual residents need to be: “unable or, owing to such fear, ...unwilling to return to it”, where “it” refers to the country of former habitual residence. This essentially amounts to the same thing.¹⁷

As I began to explain in the introduction, the motivation behind this formulation is largely historical. This law was written by the UNHCR (United Nations High Commissioner for Refugees), which was created in the aftermath of World War II (UNHCR, 2015a). It was an attempt to deal with the significant displacement that the conflict had caused. As such, any events preceding 1951, which caused significant persecution, were grounds for legitimately seeking refuge in another country. The major powers felt responsible for elements of the persecution and were attempting to deal with that responsibility. As such, they signed a convention designed to afford these individuals protection and a capacity to settle in other countries. Although the creation of this law was a huge improvement on the agreements made by the League of Nations, I will now argue that there are several problems associated with it.

§3. Problems with the Legal Definition

Now that I have stated and explained the legal definition of a refugee within the convention, I will explore the problems associated with it. In considering these problems, I argue that the legal definition of ‘refugee’ is too narrow.

The first way in which the definition is too narrow is that it only includes individuals who “have a well-founded fear of being persecuted” “as a result of events which

¹⁷ A difference between obligations to citizens and habitual residents is to be expected as the globe is structured based on state boundaries. We live in an international, rather than a global community. However, this difference in obligation *more generally* ought not interfere with the way that these individuals are treated in terms of *refugee concerns*. It seems that the law highlights the general difference by distinguishing the wording, but it does not actually suggest different treatment for these individuals. This makes the law appear more palatable to signatory states, whilst not resulting in any practical difference for individuals claiming refugee status.

occurred before 1951.” The law includes a morally arbitrary distinction between causes of persecution preceding and those following Jan 1st, 1951. If the event that caused the persecution occurred before 1 January 1951, then the individual counts as a refugee (providing she fulfills the rest of the criteria). However, if the event was after 1 January 1951, she does not. Unlike the other problems associated with the definition, the UNHCR UN Refugee Agency amended this aspect of the definition with its 1967 Protocol. The protocol effectively broadened the definition of ‘refugee’, such that the term refugee now applies to people who have a well-founded fear of persecution, irrespective of when the event(s) occurred which caused them to fear it. That is, anyone with a well-founded fear of persecution resulting from an event that occurs at *any time* can count as a refugee if they fulfill the rest of the criteria set out in Article 1. As such, the 1967 protocol served to broaden the legal definition of a refugee, eliminating one of the main morally arbitrary distinctions it drew.

This was definitely a step in the right direction because this temporal distinction is morally arbitrary. What does it matter when the event that caused someone’s persecution occurred? Surely what matters is simply that she is experiencing persecution. Despite the 1967 protocol, however, the definition is still too narrow in a number of ways.¹⁸ To explain how it is too narrow I will compare different thought experiment examples.

¹⁸ There are other more minor problems associated with the definition but I have decided to focus on its narrowness. The definition is also problematic in that it contains ambiguous terms such as: “well-founded fear” and “persecuted”. For example, the notion of a “well-founded fear” is rather ambiguous. It is hard to see what would count as a “well-founded fear”. Well-founded on what? From whose perspective need it be well-founded? Another example of ambiguous wording is “persecuted”. What kinds of persecution is included: physical, psychological etc. Furthermore what counts as persecution? how intense and persistent does it need to be? Would a one off instance count or does it need to be a more persistent problem? The term itself is unclear. Ambiguity such as this in legal definitions means that they are in danger of being interpreted and ratified differently in different countries. This could lead to inconsistencies between countries in which some include more people than others in their definition of ‘refugee’. The practical outcome of this is that some countries would be obliged to offer refugee protection to people who other countries would not. Further stipulation of these terms is required if a difference in interpretation and ratification is to be avoided.

§3.1. Group Based

The definition is limited to group-based persecution. That is, only those who are experiencing persecution as a result of their active or passive membership of a particular group fall under the definition. For example, people who are persecuted as a result of their “race, religion, nationality, membership of a particular social group or political opinion” fall under the definition of a refugee¹⁹ (Article 1(2)). I will now offer a comparison between someone experiencing persecution as a result of their membership of a religious group and someone who is experiencing persecution as a result of their individual, non-religious action, to demonstrate why this narrowness is problematic.

First, imagine Sally who practices Falun Gong in China. She sneaks out to a religious meditation. People who practice the Falun Gong religion in China are often captured and tortured. In many cases their organs are harvested and sold.²⁰ Imagine Sally’s religious meeting is stormed and she is captured. Her organs are going to be harvested but she manages to escape and get to a refugee camp on the border. The current state of the law would likely count Sally as a refugee because she is fleeing a well-founded fear of persecution resulting from her membership of a particular group.²¹

Now imagine a case in which Samantha is persecuted as a result of something that is distinctive about her, which does not pertain to group membership. For example, imagine the state condemns x-ing and Samantha has chosen to x; assuming x is a reasonable activity in this case, which is not usually seen as a criminal act, such as going out after dark. Imagine Samantha chose to go out after dark of her own volition, and not because she was a member of a particular group pertaining to race, religion, political opinion etc. For example, she chooses to go out to visit her son who is ill, despite the personal risk to herself if the state catches her. Note that her action was not the result of her holding a particular group-held political opinion about rules

¹⁹ Provided they fulfill all the other criteria in the definition.

²⁰ Evidence of organ harvesting in Sujiatun Thrombosis Hospital has been shown in a number of sources. The most prominent of which is Kilgour and Matas’s 2007 report to the US NGO known as the Coalition to Investigate the Persecution of Falun Gong in China (CIPFG) (Kilgour and Matas, 2007)

²¹ Provided she fulfilled the rest of the criteria in the definition.

pertaining to after dark escapades. Rather her action was the result of her individual care for her son. Imagine, for the sake of the thought experiment that the punishment for going out after dark in this state is having your organs forcibly harvested and sold, as in the case of the Falun Gong above. Samantha hears the police coming as she sneaks down the street. She is captured but manages to escape and reach a refugee camp on the border. She claims refuge. The current state of the law would not technically allow her to claim refuge, as she is not fleeing persecution resulting from her membership of a particular group.

The intuition I am trying to motivate is that these cases seem to be similar in the morally relevant sense when determining whether one should count as a refugee; even though they may be dissimilar in terms of whether the cause of their persecution is individual or group-based.²² As such, I argue that the fact that the legal definition draws a morally arbitrary distinction when it allows for group-based persecution and

²² An objection can be made against this criticism that the law is too narrow because it is limited to members of groups and thereby doesn't capture individuals who are persecuted for individual reasons. One could argue that, at least in a gimmicky way, we could say any collection of people is a group. For example, using the thought experiment above, one could say that there is a group that contains all people who go out after dark. As such, Samantha's persecution would be "group-based enough" to count. One could make a similar argument to the same end and say that a mathematical or metaphysical definition of a group only requires one member. As such, Samantha alone could count as a group. As such, one could argue that the criticism of the law for not including individuals who are persecuted for individual reasons, rather than group reasons does not hold.

Although this is an interesting way to look at the problem in an abstract sense, I argue that it ultimately misses the point of the wording of the law in a practical sense. Each of the options for counting as a refugee under the current state of the law pertain to membership of a socially recognized group: race, gender, political opinion etc. These are commonly understood ways of grouping people. They are also ways of grouping people that often lead to persecution. The groups explained in the response above are not commonplace groups of which everyone is aware. As such, it is hard to imagine that a judge would count membership of a previously undefined group of individuals who are out after dark, or membership of a group of one person, as sufficient to satisfy the underlying "membership of a group criterion" of the law. However, even if my reader does not accept my response to this objection here, they will likely find the next criticism of the law more convincing.

not individual-based persecution. This morally arbitrary exclusion of individual – based persecution means that the current legal definition is too narrow.

§3.2. Exclusion of Non-Listed Persecution

Another related reason that the legal definition is too narrow is that an individual has to be experiencing persecution that occurs as a result of one of a *stipulated set* of group-based qualities if they are to fall under the definition of the term ‘refugee’. That is, the definition lists qualities of a person that can be grounds for the kind of persecution that is required to allow someone fulfilling the other criteria of the definition to count as a refugee. The convention covers “race, religion, nationality, membership of a particular social group or political opinion” (Article 1(2)). In listing these qualities the definition excludes those qualities that are not listed as legitimate sources of persecution warranting refugee status. As such, not only is the definition limited to persecution resulting from group membership, but also it is limited to persecution resulting from *specific kinds* of group membership pertaining to race, religion etc. This limitation of the definition means that it does not technically leave room for persecution resulting from membership to other groups such as those concerned with sexuality.²³ To see the moral arbitrariness of covering some groups and not others, let us consider another comparative thought experiment.

Imagine Jim is being persecuted as a result of his race and Jemma is being persecuted for her sexual orientation. Imagine both are facing the same persecution in their country of origin. The only difference is that one state allows for persecution based on race and the other based on sexuality. Does it make sense that the law ought to allow

²³ It is important to note that although the definition does not obviously include people fleeing persecution resulting from their sexuality, it is theoretically possible to recognise “lesbian, gay, bisexual and transgender (LGBT) and intersex individuals” fleeing persecution as falling under the definition’s “particular social group” clause (Free & Equal, 2014). The United Nations High Commissioner for Refugees (UNHCR) supports this interpretation (Free & Equal, 2014). As a result, some countries, such as Canada accept this interpretation (Free & Equal, 2014; Settlement.Org.2015). However, *many* do not (Free & Equal, 2014). The result is that those that do not accept this interpretation do not recognise “refugee claims based on persecution related to sexual orientation, gender identity and intersex status” (Free & Equal, 2014). As such, in many instances, individuals who flee persecution as a result of their sexuality do not fall into a group that is covered by the definition and consequently do not receive refuge in practice.

Jim to count as a refugee and receive the corresponding protection but Jemma ought not? This is a morally arbitrary distinction in the same way that temporal location is morally arbitrary. The implications for Jim and Jemma are the same irrespective of the cause of their persecution. Again the intuition is that Jim and Jemma's cases are similar in the morally relevant sense despite their difference in cause of persecution. The definition again proves too narrow in this respect.

§3.3. Persecution

I go one step further however and argue that it is too narrow in a more fundamental sense. This legal definition confines the term 'refugee' to those experiencing persecution. However, if it is possible to question the relevance of particular causes of persecution, it becomes question whether persecution is a morally relevant aspect of the definition of 'refugee' I don't think it is. I will again motivate my intuition by comparing two cases.

Imagine Terry is being persecuted. For whatever reason, he has been tortured for some time and the torturers have decided that tomorrow his torture will result in death. Now imagine Tina. She is living in extreme poverty, has been for some time and the extent of her starvation will result in death tomorrow. Imagine that the pain caused by Terry's torture and mode of death has been and will be equivalent to Tina's. There are similarities between these cases, the most obvious of which being that both will die, and that they will die having experienced the same amount of pain. All the same, I admit that there are significant dissimilarities in these cases. The cause and mode of the pain/death is different. In Terry's case it is torture inflicted by another person. In Tina's case it is starvation, which is not (at least directly) inflicted by another person. However, despite these apparent differences, I have the intuition that both ought to count as refugees and receive protection.

It seems these dissimilarities are not what is relevant in determining whether each individual ought to count as a refugee. The legal definition of refugee is too narrow, then, when it considers that only those who face persecution meet the criteria for being refugees. This is troublesome, however, as I have now argued that when a person faces persecution is irrelevant (3.1), that the cause of the persecution is

irrelevant (3.2) and that the notion of persecution itself is too narrow to be a relevant criteria in determining who qualifies as a refugee. What is relevant?

I believe the relevant factor is *hardship*. In each of the cases discussed (Sally, Samantha, Jim, Jemma, Terry and Tina) a significant level of hardship is present. Sally and Samantha experience hardship resulting from the likelihood of their organs being harvested as a result of religious group membership or decisions to visit sick children. Jim and Jemma experience hardship resulting from persecution pertaining to their race and sexuality respectively. Terry and Tina experience hardship in the form of likely torture leading to death or likely starvation culminating in death. Irrespective of the differences between these cases, there seems to be something that makes us intuitively want to count them in the definition of refugee and consequently offer them the protections associated with falling under that definition. I believe the common ground is hardship. In Chapter 2 I will offer an argument for why I think the definition ought to be altered to reflect a hardship focus.

§3.4. Outside the Country of Origin

For now I will explore one further respect in which I think the definition is too narrow, bearing the idea of hardship in mind. I believe the definition is too narrow insofar as it limits the term ‘refugee’ to those who have managed to leave their country of “nationality” or their “habitual residence” if they were stateless.

Under the current definition, the person has to be “outside” their country of “nationality” or “habitual residence” if they are to count as a refugee. As such, this definition actively excludes two types of people: Internally Displaced Persons and people who have not moved at all. Internally Displaced Persons are individuals who have had to move within their country of origin as a result of the same causes as refugees, in addition to civil war and natural disasters (UNHCR, 2015b). However, unlike refugees, Internally Displaced Persons are not covered by specific protection under international law. In fact, because they have not left their country of origin, they remain under the jurisdiction of their national government (UNHCR, 2015b). This is particularly problematic if their government is the cause of their hardship (UNHCR, 2015b). As such, according to the UNHCR, “[i]nternally displaced persons, or internally displaced persons, are among the world’s most vulnerable people”

(UNHCR, 2015b). The second group of people that are actively not included in the legal definition of the term refugee are those who have not moved at all from the geographical location of their hardship for whatever reason. They also remain under the jurisdiction of their government.

Both of these groups experience the same kind of hardship in the country of origin as those who manage to flee across the border. The UNHCR argues that this is at least the case for internally displaced persons (UNHCR, 2015) and it is hard to see why those who do not move would experience any less significant hardship.

The only difference between Internally Displaced Persons, those who have not moved and refugees with respect to hardship is that those who currently fall under the definition of ‘refugee’ managed to flee across a national boundary. The result of this difference is that Internally Displaced Persons and individuals who have not moved are still covered by the jurisdiction of the government of the country of origin while the refugee falls under the jurisdiction of the pertinent international law and the country they have sought immediate refuge in.

The difficulty that arises here is that the hardship of all three – Internally Displaced Persons, Persons who haven’t moved and refugees – might well be indistinguishable. Refugees, internally displaced persons and individuals who have not moved seem to be equivalent when considered in terms of hardship. The only difference between them is the geographical location of the individual (and, as we shall see, the jurisdiction they fall under). I posit that these are not morally relevant differences when weighed against the hardship experienced by the individual. As such, I argue that this is another way in which the definition of the term ‘refugee’ is too narrow. In the way that I showed other criteria of the legal definition to distinguish between irrelevant factors, geographic location excludes like-cases of hardship. I will begin with the location of the individual in isolation and move on to a discussion of the legal jurisdiction they fall under.

I will explain this criticism in the form of a thought experiment. This thought experiment will focus on the example of an individual who has not moved at all, rather than focusing on an Internally Displaced Person. The reason is that if we can

show that an individual who has not moved ought to count as a refugee, then the definition will be broad enough to also include an Internally Displaced Person.

Imagine that both Peter and Phyllis have a well-founded fear of being tortured. For argument's sake, say they are facing the same imminent torture, whatever it may be. The only difference is that Peter has made it to a refugee camp across the border from his country of origin and Phyllis, because she fears for the well-being of those she would leave behind, has not moved from her original geographical location.²⁴ It is not clear why this should leave Phyllis helpless to seek protection from other states, or why other states should have no obligation to help her; moreover, none of the reasons which might make her unable or unwilling to move from her country of origin should leave her without the recourse afforded to Peter. This is because I believe that the geographical location of an individual experiencing hardship is largely irrelevant to the experience of hardship *prima facie* and is therefore morally irrelevant, if the hardship is in all other respects equal.

One way to motivate this view is to take the idea of borders, governments and sovereignty out of the mix for a moment and simply consider two locations on the earth.²⁵ Place Peter on one and Phyllis on the other. We have no reason to think that their locations should be in any way relevant to whether we have an obligation to help alleviate their hardship. Other questions can impact on whether we have that

²⁴ There are several reasons why Phyllis may not have moved. For example, she may have insufficient funds to move, she may be punished in some way for attempting to leave, or have dependents (children, parents, spouses) and lack the capacity to move them all. It is not, in fact, always possible to move. Individuals caught attempting to flee North Korea, for instance, are “shot-on-site,” arrested and executed, or indefinitely imprisoned” (North Korea Now, 2015).

Placed In the first situation, an individual simply cannot move. In the second and third situations, she judges that the risk associated with staying does not outweigh the risk of leaving, or the costs of leaving dependents behind. In some cases dependents of those who have left will be in greater danger as a result of their relative's move. For example, in North Korea, if one family member illegally leaves the state, their remaining family members are liable to be punished by the state (North Korea Now, 2015).

²⁵ As I argued in the first section of this chapter, the temporal location is irrelevant in this example and the forthcoming arguments.

obligation, but spatial location is not one of them. It is only when national borders defining government's jurisdictions are added into the picture that the spatial or geographical location of the individual in question becomes relevant in any sense.

As such, the defining feature of Peter is not that he has moved geographically; it is that he has moved out of one government's jurisdiction and into another's. If he had moved within the first country and had not made it over the border, then any attempt by another state to help either him or Phyllis would constitute international intervention (if it were not conducted with permission from the original government) and would be a breach of state sovereignty.

As such, when the context of national borders is considered, *the geographical location* of the individual becomes relevant in a sense because it encompasses the idea of a certain jurisdiction. When it is weighed against the *hardship* the individual is experiencing, however, geographical location loses *relevance* from a moral perspective. There is reason to believe that some things trump state sovereignty. It seems to me that the human rights that collectively protect individuals from the kind of significant hardship that refugees experience are more important than states' interests in maintaining sovereignty. This is a controversial claim and a detailed support of this claim is beyond the scope of this paper. However, I will offer preliminary support in the form of Donnelly (2014). Donnelly argues that we ought to modify our conception of state sovereignty so as to incorporate human rights. He suggests that state sovereignty can be legitimately limited so as to uphold human rights (Donnelly, 2014:237). This implies that he too would believe that some of the hardship faced by refugees, specifically the hardships that compromise human rights, trump state sovereignty.

This gives us some reason to think that the hardship of the refugee trumps the state's interest in maintaining sole jurisdiction over its dealings with its subjects. That is, if a state is causing or failing to protect a subject from significant hardship, then the international community is justified in intervening to remedy the situation because the individual's hardship (human rights abuse) is more morally significant than the state's desire to maintain autonomous control over its people. In this way, the geographical

location of an individual is largely morally insignificant in comparison to the hardship of the individual.

So far I have been speaking as if the hardship is equal in both Peter's and Phyllis' cases. However, hardship is decidedly unequal in cases of internal and external refugees; internal refugees being those like Phyllis who have not left their original location or internally displaced persons who have not left the country of origin and external refugees being those like Peter who have made it across the national border. In comparative cases such as these the individuals left in the original location are likely to experience more hardship as a result of the extended time spent there, unless something is going terribly wrong in the refugee camp that the external refugee has made it to. I regret that I cannot offer empirical evidence for this claim. However, I believe that support for this claim can come from thinking about the sorts of things that the refugees would be fleeing (persecution, starvation etc. as discussed above). The internal refugee is left at the site of the hardship, whereas the external refugee has managed to move away from the site of hardship in question. If the external refugee arrives at the camp and finds that things are worse than the original place that he left, then something has gone terribly wrong with the organization of the camp. It is clearly failing to meet its purpose of providing a suitable (safe and reasonably well stocked) place for refugees to seek refuge in. As such, I believe that we can assume that in *most* cases, the internal refugee is likely to experience more hardship. This can be seen in the example of Peter and Phyllis, though in order to explain this, I will need to split the example into two time slices.

To begin with in t_1 , both Peter and Phyllis are experiencing the same level and kind of hardship (torture). However, at t_2 , after the relocation of Peter, Peter is no longer experiencing the same kind and possibly level of hardship. He is no longer being tortured, though the conditions in the camp may not be ideal, they are at least likely to be free from torture and are likely to be better than Peter's original situation. As such, although Peter's hardship has likely reduced in t_2 , Phyllis' has remained the same. If hardship is in fact the key condition for being a refugee, then the idea that Peter should qualify for refugee status while Phyllis does not seems absurd. I will spend Chapter 2 mounting an argument for why I believe hardship to be the key condition of being a refugee. This will then offer further grounding for my argument in this

chapter that the legal definition is too narrow in its limitation of the term “refugee” to covering only those who have managed to move out of the country of origin.

Conclusion

In summary, I argue that the legal definition of the term “refugee” is too narrow in a number of ways, because it does not recognize the importance of hardship in defining the term ‘refugee’. It is limited to those who have a well-founded fear of group-based persecution, resulting from a very specific set of qualities, and who are already outside of their country of origin. I have argued that the reason that this definition is so narrow is that the authors failed to recognize that the definition ought to be hardship focused. I will now offer reasons to believe the definition ought to be hardship based in the following chapter

Chapter 2: Hardship-Focus

In this chapter I will offer reasons to believe that hardship is morally significant. From here I hope that the reader begin to become sensitive to the idea that the legal definition of the term ‘refugee’ ought to be hardship focused. Drawing on Wiggins (1987), I will argue that any social morality must consider the denial of human needs and subsequent hardship to be morally significant. Then, comparing Singer (1972, 1993) and Anderson (1999), I will argue that Wiggins’ insight should lead to a non-consequentialist account of how the moral significance of hardship is to be understood.

§1. Wiggins

Refugees seek refuge from persecution and other hardships, as I explored in my first chapter. We have good reason to think that such hardships must be considered morally significant. This is because these hardships affect some of the most basic needs human beings have when considered in virtue of their humanity. Any social morality is something that is lived by human beings, who have these needs, and require them to be sustained; thus social morality defends their significance. David Wiggins, in his 1987 essay, “Claims of Need” provides a powerful argument that develops these points, in abstraction from the particular plight of refugees. I will first outline the Wigginsian-style argument that I will run in this section before turning to a more detailed exploration of the first few steps that come directly from Wiggins.

Wiggins suggests that morality is not an abstract notion. It is a matter of social concern, and implicates real people. Real people have needs. Some of our needs are relative (to our culture/society/time) and some are absolute (in virtue of our humanity say). Wiggins argues that social moralities regard absolute needs as morally significant (Wiggins, 1987:33). Essentially, a denial of absolute needs constitutes a harm to the individual. I posit that it also constitutes a type of hardship. I show that refugees’ absolute needs are denied and that this results in hardship (and harm for that matter). I suggest that the denial of absolute needs present in hardship cases renders hardship morally significant in the same way that harm is. As such, social morality must regard the denial of refugees’ absolute needs, which constitutes hardship; as

morally significant.²⁶ . I will now make this argument in more detail using backing from Wiggins' *Needs, Values, Truth*.

Wiggins correctly observes that morality is not an intellectual construct produced by academics. “[S]ocial morality... is not just any old set of abstract principles. It is something that exists only as realized or embodied... in a shared sensibility, and in the historically given *mores* and institutions that are themselves perpetuated by it” (Wiggins, 1987:33). This essentially means that morality is lived by real people and is situated in a social and historical context. It both sustains and is sustained by mores and social conventions. Any morality that will map on to reality must be applicable to real people (Wiggins, 1987:33).

In being applicable, morality must protect the needs of people whom it governs. The social mores that people live by, and the institutions that they live in, must sustain the lives of those who participate in them. This means that morality must protect the needs of individuals who live by it. As such, social morality must not arbitrarily sacrifice the needs of an individual for the greater good. In Wiggins' words: “A social morality... must not be such as to threaten anyone who is to be bound by it that it will bring upon him or any other individual participant, as if gratuitously, the misfortune of having his vital interests simply sacrificed for the sake of some larger public good” (Wiggins, 1987:33). In accounting for needs, morality protects individuals' needs.

At this point, one may ask, what counts as a need that must be protected if morality is to be upheld? That is, which needs are morally significant? Needs fall into two distinct categories: relative needs and absolute needs (Wiggins, 1987:9; Wiggins, 1987:11). Relative needs are those that are sensitive to one's culture, society, time or individuals differing perceptions (Wiggins, 1987:11). These needs allow individuals to make claims under specific social conventions in which those needs feature. In contrast, absolute needs are needs we cannot help but have in virtue of our humanity.

²⁶ This does not mean that all views of social morality must agree that hardship must be avoided. It means that in all views of social morality, the fact that refugees' absolute needs are being neglected and they are experiencing harm and hardship must always carry some moral weight. That is, the denial of absolute need (and thereby the presence of harm and hardship) is never morally irrelevant, and would require some complex arguments to outweigh.

Although Wiggins does not stipulate examples of absolute needs, I take him to mean the needs that we usually associate with basic human rights. A non-exhaustive list might include: the need for basic shelter, adequate food and water, in addition to the need to maintain personal bodily security, the need for freedom from torture etc. Absolute needs are based in a “necessity for the avoidance of harm to human beings” (Wiggins, 1987:9). They are “so far from being indeterminate or seriously contestable that they are more or less decidable” (Wiggins, 1987:11-12). As such, unlike relative needs, absolute needs are not dependent upon the presence of specific social conventions or institutions. They are relevant under any system of social conventions. To sum up the idea, then, absolute needs are the needs any human being cannot help but have and are not seriously contestable as needs.

It is these absolute needs that Wiggins believes that morality commands us to protect (Wiggins, 1987:33). He does not claim that we ought not protect relative needs. He simply focuses on absolute needs when discussing moral significance (Wiggins, 1987:33). Absolute needs are morally significant because they are needs that humans have in virtue of their humanity and as I showed above. Wiggins believes that morality is supposed to protect the needs of society. Absolute needs are the most fundamental needs for society’s members. As such, for Wiggins, absolute needs are morally significant. Wiggins would also find a denial of absolute needs to be morally significant.

Furthermore, Wiggins suggests that the denial of absolute needs is connected with harm. He posits that connecting humans’ absolute needs with harm is relatively uncontroversial (Wiggins, 1987:9). Where an individual’s absolute needs are compromised, the individual is likely to come to harm. In fact, claims to needs get “their *prima facie* special practical and argumentative force” from their connection with avoiding harm (Wiggins, 1987:9). Wiggins point is that, the idea that if one’s absolute needs are denied then they are being harmed is intuitively credible. As we know from above, Wiggins believes that the denial of absolute needs is morally significant. As the denial of absolute needs is morally significant, we have reason to believe that harm is a morally significant factor.

From here I would like to draw a parallel between harm and the notion of ‘hardship’.

²⁷ The reason for drawing this parallel is that I believe that a denial of absolute needs results in hardship, in the way that it results in harm. To show this I will offer an example then address a counter example. I will show that cases pertaining to refugees are relevantly dissimilar to the counter example. I will then show that the denial of absolute needs renders hardship morally significant in the same way that it renders harm morally significant.

To make this argument, I will begin by showing that a denial of absolute needs results in hardship. It is difficult to imagine a situation of denial of absolute need that does not cause hardship. A typical case of absolute need looks something like this. Imagine an individual is deprived of the absolute need of adequate access to water. She is dehydrated which causes dizziness, lethargy, confusion, a weakness of pulse, seizures etc. (NHS, 2016). Here she is experiencing an archetypal situation of extreme physical hardship. She has the physical symptoms of dehydration. Furthermore, she may also be experiencing anxiety about how she will access water. As such, dehydration, as an example of the denial of an absolute need, clearly results in hardship for the dehydrated person.

However, it is important to note that not every case of a denial of absolute need causes hardship (or harm for that matter).²⁸ As such, I will now address a counter example to my argument. Imagine a fasting Monk has a denial of the absolute need of access to food. It is unclear that he is experiencing hardship. This is because he has a desire to have his absolute needs denied in this instance. Even though he is experiencing a similar denial of absolute needs that starving refugees might experience, he is doing so for religious reasons rather than because his physical

²⁷ I have elected not to define hardship or to connect harm and hardship on the basis of their definitions. My reason for this is that I do not want to make the same mistake that the current legal definition makes by mentioning a list of qualities to include and in doing so, define away cases that I have failed to mention. However, I do not want to leave my reader without any indication of what I think hardship might be. As such, I believe that someone experiences hardship if they are physically or psychologically deprived or threatened.

²⁸ It is important to note that what follows in this counter example applies equally to harm and hardship.

circumstances leave him no other option. As such, some may think of this as an exception to the idea that a denial of absolute need causes hardship. They would argue that he is not experiencing hardship or harm because he chose to deny himself of the absolute need of food and desires that this be the case. While others would still see this as a situation characterised by hardship, just a situation in which that that hardship was chosen.

However, cases such as this are exceptions to the general rule that the denial of absolute needs results in hardship. In most instances a denial of absolute need does constitute hardship. For example, most people who are denied shelter, food or water do not choose to have these basic necessities denied. They are denied them as a result of external factors. I will argue that the denial of absolute needs that refugees experience falls into this general rule category rather than into the category of the monk case.

I posit that refugees' absolute needs are denied and that this causes hardship.²⁹ Refugees are often made refugees as a result of a denial of their absolute needs. For example, political refugees fleeing physical persecution are denied the absolute need of bodily security. If they are captured by or remain in the captivity of, their persecutors, then their bodily integrity will be undermined. As such, their absolute need of bodily security is in jeopardy. In fleeing circumstances in which this need would be denied/continue to be denied, they are fleeing circumstances that would be/are characterised by hardship. Another example can be seen in relation to economic refugees whose absolute needs of shelter, food and water are denied. These individuals experience hardship as a result of starvation and being left outside

²⁹ It is important to note that refugees' relative needs are also often denied. For example imagine a case in which a refugee whose absolute need to maintain bodily security is denied in that they are captured by their persecutors and tortured. This may also deny a relative need. For example, within specific cultures, torture victims may be seen as having lost their honour as a result of being tortured. However, the significance of the denial of their absolute need to maintain bodily security transcends these socially entrenched relative concerns because the absolute need is a need that a person has in virtue of their humanity. In this paper I discuss all refugees, indiscriminant of culture. As such, I focus on the needs that all people have in virtue of their humanity, rather than on needs that are common to only some societies. As a result, I concentrate on refugees' absolute needs and examine the hardship that results.

exposed to the elements. As such, it seems clear that the denial of refugees' absolute needs constitutes hardship.

Before we move on I will show why refugees' denial of absolute needs is distinct from the fasting monk case described above. That is, refugees' denial of absolute needs does constitute hardship unlike the monk case. The reason for this is that unlike the monk, refugees do not desire the denial of their absolute needs. We can see this because the denial of these needs caused them to flee the situation in which their needs were being denied in the hope of reaching a place in which those needs are met. As such, refugees do not desire that their absolute needs be denied, but they are denied anyway. This constitutes a clear case of hardship (and harm for that matter).

Having established that a denial of refugees' absolute needs constitutes hardship, I will now show that hardship, like harm, is morally significant. Hardship is morally significant in the same way that harm is morally significant; in virtue being a denial of absolute need.³⁰ As we explored above, Wiggins showed that absolute need is morally significant because morality concerns the people who participate in it and absolute needs are indispensable to persons. In the same way that absolute need is morally significant, so too is a denial of absolute need. Wiggins posits that a denial of absolute need causes harm and as such, harm is morally significant. I suggested that a denial of absolute need causes hardship (in most cases) and as such I posit that hardship is morally significant. As a final note, it is worth pointing out that as hardship is in general morally significant, we can see that refugees' hardship is morally significant.

In summary, in this section I aimed to show that hardship is morally significant. To get there I began with Wiggins' suggestion that morality aims to protect the needs of the people who adopt it. As such, denying the needs that are most fundamental to people (absolute needs) is morally significant. From there Wiggins showed that a denial of absolute needs leads to harm. I argued that we can draw a parallel case here

³⁰ It is important to note that there can be harms and hardships that do not deny absolute needs, which may also be morally significant. However, these are not the needs at issue in this paper. The reason that hardship/harm resulting from a denial of absolute needs is the focus of this paper is that situations that cause individuals to become refugees are situations in which their absolute needs are denied. It is this denial of absolute need that allows them access to refugee status.

and argue that the denial of absolute needs also leads to hardship. Consequently, hardship, like harm is morally significant (in virtue of their connection to the denial of absolute needs).

So what can we do with this Wigginsian argument? In appropriating Wiggins' argument for morality being focused on need, we have been able to show that hardship is morally significant. From there, one could begin to move towards the argument that because hardship is morally significant, it is reasonable grounds for the focus of a moral-legal definition of the term 'refugee'.

The way to make this connection from the significance of hardship to the definition 'refugee' is to highlight that refugees experience extreme adversity. Political refugees experience acute persecution – be it physical, mental, emotional or social. More often than not, torture or imprisonment may occur. Economic refugees are often starving, without shelter and in many cases with untreated medical ailments. Both kinds of refugees often watch loved ones experience the same sorts of turmoil, and in many cases watch those loved ones pass away as a result. These kinds of circumstances surely count as cases of hardship and are thereby morally significant (as we saw from Wiggins). In fact, they are cases of acute hardship and as such ought to add to their moral weight. As the hardship in these cases carries so much moral weight, it is reasonable to think that the notion of hardship ought to carry a significant role in a moral-legal definition of the term 'refugee'.

In the following chapter I will offer reasons to think that the law ought to reflect morality in the case of refugees and I will explore the kind of moral-legal definition that would come about if we made hardship central. However, for now I will reiterate that so far I have offered a Wigginsian reason to accept the moral significance of hardship. Now I will explore whether we should think of this hardship in consequentialist or deontological terms.

§2. Consequentialist Argument for Hardship's Centrality (Singer)

Having accepted, with Wiggins, that certain hardships must be considered morally significant, the question then arises: how can this conclusion be developed? One possible answer is a consequentialist one: all that matters, morally, is the minimising

of hardship/suffering. Peter Singer offers an approach in this vein. His consequentialist view gives us a theory-specific way to ground a hardship-focused definition of the term 'refugee'. Using a consequentialist approach is beneficial because it makes suffering and thereby hardship the primary and central focus of morality. However, as I will discuss later in this section, it is prone to a common problem facing consequentialist theories - Rawls' separateness of persons objection. For now, let us begin by explaining Singer's approach.

Singer emphasises the moral significance of absolute human needs by stressing the importance of suffering in a moral theory. Suffering, like hardship, is often a denial of absolute human needs. Singer suggests that suffering is inherently bad. In *Famine, Affluence and Morality* (1972) he asserts "the assumption that suffering and death from lack of food, shelter, and medical care are bad" (Singer, 1972:231). Singer does not feel that this assertion needs to be backed with an argument because he believes most people will agree with him on the point and that the minority who don't are unlikely to be convinced (Singer, 1972:231).³¹

In addition to the assertion that suffering is bad, Singer argues that suffering is something that we should try to minimize in the world (Singer, 1993: 90). His view essentially weighs up the different instances of suffering in the world and posits that the best moral outcome would be one in which the aggregate suffering was at the lowest possible level (Singer, 1993: 13).

It is possible to use Singer's argument about suffering to offer a consequentialist basis for an argument about hardship by recognizing that suffering is essentially synonymous with 'hardship'. One cannot really imagine suffering without hardship, or hardship without suffering for that matter. Wherever there is one, there is likely to be the other. As such, Singer's argument about the importance of avoiding suffering can also be taken to be an argument about the importance of avoiding hardship.

³¹ "I think most people will agree about this [the assertion above], although one may reach the same view by different routes. I shall not argue for this view. People can hold all sorts of eccentric positions, and perhaps from some of them it would not follow that death by starvation is in itself bad. It is difficult, perhaps impossible, to refute such positions, and so for brevity I will henceforth take this assumption as accepted. Those who disagree need read no further" (Singer, 1972:231).

Furthermore, looking at the example of refugees' experiences can highlight the connection between suffering and hardship. Refugees' experience of hardship is clearly related to suffering. It often pertains to experiencing physical, mental or emotional torture/persecution, or extreme hunger or starvation. Each of these circumstances of hardship are also situations in which suffering is occurring. I posit that suffering is a key element of hardship.

As such, I argue that Singer's argument about suffering can be applied to the notion of 'hardship' to offer a consequentialist grounding for the Wigginsian argument for the moral significance of hardship. To this end, Singer's assertion that suffering is bad and that it should be limited in the world can be used to support the suggestion that hardship is also bad/morally relevant and that we ought to limit its presence in the world.

From here, I argue that Singer would likely support a suffering/hardship-focused definition of the term 'refugee' as it is focused on factors he believes to be of moral importance. Furthermore, if the suffering/hardship-focused definition were like the one I propose in the following chapter, Singer would likely approve of it. This is because it would likely practically reduce the aggregate suffering/hardship of refugees as a whole if adopted. This is because it would focus on reducing the amount of hardship experienced by the refugee, rather than on the cause of the refugee's hardship. The current law only admits refugees fleeing persecution. Often people fleeing starvation are suffering just as much hardship as those fleeing persecution as I argued in Chapter 1. As the law only provides for the admittance of refugees fleeing persecution, there are likely cases in which an individual fleeing a smaller amount of suffering/hardship resulting from persecution will be offered refuge when an individual fleeing a larger amount of suffering/hardship resulting from starvation is not. As a result, the current law will often not result in the optimal reduction in aggregate suffering/hardship. A better way to reduce aggregate suffering/hardship would be to focus on the amount of suffering/hardship experienced, rather than its cause (i.e. persecution or famine etc.). The definition I offer in the following chapter focuses on the amount rather than the cause. As such, it is more likely to achieve the optimal reduction in aggregate suffering and Singer would thereby prefer it to the current system.

Singer's consequentialist argument pertaining to suffering offers support for my view that hardship (the amount of it) ought to be the focus of the legal definition of 'refugee'. It offers one way to ground Wiggins' view in a specific theory - consequentialism. However, there is a well-known problem that confronts all consequentialist arguments called the 'separateness of persons criticism.

The separateness of persons criticism suggests that a key failing of consequentialism is that it could potentially allow for one person to suffer/experience great hardship to bring about a reduction in the aggregate suffering/hardship of all people. This is because it conflates all instances of suffering into one big algorithm and supports the outcome in which suffering is minimized, irrespective of the suffering of individual people. As such, it does "not take seriously the plurality and distinctness of individuals" (Rawls, 1972/1999:26).

There are several reasons why this is problematic in general and in relation to the refugee case. I will focus on the problems that are most relevant to the refugee case. First, the separateness of persons criticism highlights that Singer's view is incompatible with the idea that refugees have a *right* to refuge. According to Rawls this kind of view "subjects the rights secured by justice to the calculus of social interests" (Rawls, 1972/1999: 26). This means that whether rights are protected in each instance will depend upon whether upholding them helps to minimise aggregate suffering in society. As such, rights do not really exist in a consequentialist framework. In Chapter 5 I will argue that these refugee rights exist and ought to be protected. If a refugee has a right to refuge to reduce their suffering/hardship in some way then no matter how many people's suffering/hardship will be reduced by not offering them refuge, they have to be let in.³² I believe that this safe-guard of each individual refugee's interests is important. As such, I would prefer to ground the Wigginsian idea in an approach that is compatible with refugees having rights. I will offer such an approach in the following section.

³² As such, even if letting in a refugee would marginally increase the suffering of a whole country of xenophobes, the refugee would still need to be let in if they had a right. More controversially, even if letting in a refugee would significantly increase the suffering of a country for some legitimate reason, the refugee would still need to be let in if they had a right.

Another reason why the separateness of persons criticism is particularly problematic in the refugee case is that it shows that consequentialist approaches fail to recognise that extreme hardship such as that experienced by refugees is often a violation of human dignity. Allowing individual refugees to remain suffering in hardship so that other people can avoid suffering does not respect that individual refugee's human dignity. A consequentialist would have to bite the bullet on this point. I am unwilling to commit to this drawback of the theory. As such, I offer another way of grounding hardship in the next section that is compatible with the preservation of refugees' human dignity.

Analysis of Singer's argument shows that refugees' suffering/hardship is morally significant and that the definition of the term refugee ought to be broadened so that it captures that suffering/hardship on a consequentialist picture. However, his argument is problematic as it is vulnerable to the separateness of persons objection as a result of its consequentialist commitments. As a result of this vulnerability, I will now explore a deontological approach to hardship.

§3. Deontological Argument for Hardship's Centrality (Anderson)

I have just argued that, while we must understand severe hardship with respect to absolute human needs as morally significant, we should not understand this significance in consequentialist terms. Elizabeth Anderson offers us a non-consequentialist alternative (Anderson, 1999). Anderson's "What Is the Point of Equality?" can be used to offer a deontological basis for the Wigginsian idea that hardship is morally significant. In having a deontological theory, Anderson is able to offer a grounding for my proposed hardship focus of the legal definition of the term 'refugee' that is compatible with rights and human dignity. Being a deontological theory it is not subject to the separateness of persons objection. I will offer a brief summary of Anderson's idea here and then go into more detail below. Briefly, her argument can be used to show that it is the *presence of hardship* itself, rather than the *cause* of the hardship that matters.³³ It doesn't matter how someone got into a

³³ There is the illusion of similarity between Singer and Anderson on this point. It is necessary to bear in mind that Singer's argument is concerned with reducing the aggregate of suffering/hardship while

situation of hardship. The idea is that leaving someone in hardship, no matter why they are experiencing hardship, fails to recognise them as an equal and undermines their human dignity. In this way, we have a deontological grounding for the idea that hardship is incredibly morally significant. Before we get into the nuance of this idea, I will first explain the view that Anderson is responding to.

Anderson offers an argument that can be used to ground hardship that comes in the form of a response to luck egalitarianism. First I will explain what luck egalitarianism is and why Anderson believes that it is a problem as this acts as the motivation for the part of her argument that can be seen to ground hardship. So let us begin with luck egalitarianism.

Luck egalitarianism suggests that individuals are not culpable for instances of *brute luck*. These are circumstances that they are born into, or had no hand in choosing. According to luck egalitarians we are obligated to help people who are victims of brute luck.³⁴ However, luck egalitarians believe that individuals are culpable for instances of *option luck*. Option luck refers to circumstances that the individual had a hand in causing through some choice that they made. For example, imagine someone chooses to drink excessively over a number of years. This choice could lead to a situation in which that individual needs a liver transplant. According to luck egalitarians, this would be an instance of option luck, as it was a result of the individual's previous choice(s) to drink. Luck egalitarians would not advocate helping the individual remedy the situation in question, either by offering a transplant, or in a more minimal way such as offering alcohol rehabilitation programs. This is because the difficulty in question was the result of the individual's previous choices and is therefore an instance of option luck, which society is not required to help remedy. Essentially, luck egalitarians believe that those experiencing option luck are culpable for the situation in which they now find themselves and therefore ought not be helped.

Anderson avoids the problem of the separateness of persons by upholding their human dignity as individuals.

³⁴ The appeal of this thought comes from "its apparently humanitarian impulse. When decent people see others suffer for no good reason – say, children dying from starvation – they tend to regard it as a matter of obligation that the more fortunate come to their aid" (Anderson, 1999:290).

Before we move on to Anderson's argument, let us first consider how refugees would fare in a luck egalitarian world. It would largely depend on whether we thought they were victims of brute luck or perpetrators of their own bad option luck. If we thought that they were victims of brute luck because they had been born into a situation of terrible poverty or born into a country run by a despotic dictator who tortures those he does not approve of – for example, Pol Pot targeted individuals who wore glasses – then they would be compensated for their bad luck. We would be obligated to help them in some way to build them up and equalize their circumstances with others. Assuming morality transcends national boundaries (an argument I will give one reason to believe in Chapter 4) this would essentially mean that states would be obligated to grant them refuge and allow them to be citizens. So if refugees were thought to be victims of brute luck, in a luck egalitarian world, they would fare rather well.

However, if refugees were thought to be in their situation as a result of option luck, they would not fare well. One may think that refugees are in their situation as a result of option luck if they thought that economic refugees had simply not made the right employment choices or that they really should have moved to get a job, or that refugees fleeing natural disaster should not have lived in a disaster prone place had they any inclination of the nature of the site. According to luck egalitarians, in these situations, individuals ought to have made alternative choices since, in choosing to do as they did, they were made responsible for the outcome of their actions. In short, in failing to choose well, they forfeited their claim to assistance. As such, if refugees are seen to fall into this category, then states would not be obligated to help them as they would be responsible for their own situation and luck egalitarianism withholds obligations in cases in which the individual in need is in any way responsible for being in need.³⁵

³⁵ Before I move on to Anderson's criticism, I would first like to flag a key problem with luck egalitarianism's take on option luck. I do not believe that the cases above are instances of option luck (to be honest, I do not believe that option luck exists in most circumstances). I believe that almost all situations can be reduced back to brute luck. This belief is based in a belief that one's place of birth, parent's income, education, mental capacity, etc. effectively determine many of the key aspects of an individual's prospects. Take the refugee fleeing a natural disaster. A luck egalitarian may argue that this individual ought to not to have lived in an area that they knew to be prone to natural disasters.

Transposing the notion of hardship into the discussion for the luck egalitarian, the cause of the hardship is pivotal. We are not obligated to help those who are in hardship if they had a hand in causing their hardship. I believe that Anderson would argue against this view. She may be taken to show that certain qualities of hardship itself are the problem. If we break down the notion of hardship, we find that hardship can possess many unsavory qualities. For example, it can be demeaning, marginalizing, exploitative, involves domination and/or oppression. Anderson takes issue with each of these in her paper and in doing so, she shows that hardship itself,

However, I would argue that in many cases, individuals do not have a choice as to whether they will live in those places or not. Take Nepal for example. Nepal was recently hit by an earthquake. The locals know that Nepal is prone to earthquakes. It is situated on the fault between the Indo-Australian and Asian plate. However, despite this knowledge many people live there. Luck egalitarians may argue that these individuals choose to live there and therefore ought not be helped when the quake hit and destroyed homes and caused significant injuries and deaths. However, I would argue that these individuals may not *really* have chosen to live there. Many of them were born there, grew up there and lacked the financial means to move away/did not want to leave elderly relatives etc. Can these kinds of circumstances really count as a choice?

Take a less extreme example. Imagine Jimmy decides to smoke marijuana when he is a teenager. His friends are all doing it. They say there is not anything else worth doing after school. His parents did it when they were young so he thinks he will give it a go. He becomes addicted and continues to use it into his adult life. He is unlucky and develops schizophrenia. Luck egalitarians would probably think that Jimmy's case is an instance of option luck. He was responsible for his own circumstances as he *chose* to take marijuana. However, again I would argue that this can be reduced to a case of brute luck. Jimmy's decision to smoke marijuana was largely conditioned by his socio-economic environment. He was brought up in a town where all his friends else smoked. His parents did not goad him against it, having smoked in their youth. Furthermore, there was little else for him to do after school. He was not given opportunities for other pursuits such as school co-curricular activities etc. (sport, music or drama). Even in this trickier example, I believe that we can see apparent option luck being reduced to its brute luck core.

As I believe the refugee case is an instance of brute luck no matter how you look at it, refugees ought to be helped out of their hardship even if luck egalitarianism were to be adopted as a policy model. However, this is not a universally accepted view. As such, Anderson offers an alternative route for ensuring that states are obligated to help to limit/eliminate refugees' hardship.

with all its qualities, is morally significant; even though she does not explicitly refer to 'hardship' in her paper.

She argues that we ought to ensure that no one is left to experience situations of hardship because if we do leave people in these positions we fail to recognise them as equals and fellow possessors of human dignity. She argues that everyone ought to be recognized as equals (312) and treated with equal respect (314)³⁶, echoing thoughts of human dignity (319) and ideas of human functioning (317-320) (Anderson, 1999:312-320). What equal respect means in this context is that people are not left in positions that are demeaning, marginalizing, degrading, exploitative, violent, involve physical coercion, domination, oppression etc. (Anderson, 1999:313, 315).³⁷

One way to cash out this idea is that people are not to be left in situations of significant hardship, such as those of a refugee seeking refuge. We ought not leave individuals in extreme economic turmoil, as these physical circumstances of scraping for food would be demeaning. We ought not leave individuals in situations of political persecution as these circumstances would treat the individuals as inferior and can often be violent. Furthermore, we ought not turn genuine asylum seekers away who have come to our country's doorstep for asylum as to do so would marginalize their claim and it would return them to their country of origin which may place them back into situations of oppression/violence etc. Furthermore, we ought not leave people suffering in refugee camps waiting for years to be admitted to a destination country as depending on the conditions in the camp, to do so may leave them in demeaning living conditions. Furthermore, leaving refugees in a camp and refusing to allow them to find a place to call home could be seen as failing to fulfill a human need to belong, which could be seen as interfering with their proper functioning as a human.

Leaving individuals in any of these situations would fail to respect them as equals. It would fail to respect their human dignity and their functioning as a human being (Anderson, 1999:317-318). "Functioning as a human being requires effective access

³⁶ There is an "unconditional obligation of others to respect... [individual's] dignity... [and] moral equality" (Anderson, 1999:319).

³⁷ "Nothing can justify treating people in these ways, except just punishment for crimes and defence against violence" (Anderson, 1999:313).

to the means of sustaining one's biological existence – food, shelter, clothing, medical care – and access to the basic conditions of human agency” etc. (Anderson, 1999:317-318). Loosely speaking, economic refugees often lack the material qualities listed here; political refugees often lack the agency. Whichever quality they are missing, refugees' human functioning is being impaired while they are in their country of origin and often even when they reach a camp. We are obliged to treat them as equals and in doing so respect their human functioning and attempt to facilitate it's actualization when it is not being achieved without our help.

As such, unlike luck egalitarianism, Anderson's democratic equality theory rests on the position that it does not matter what caused someone to be in a position of hardship. What matters is that they are in a position of hardship.³⁸ Hardship is thereby morally significant. So she contests the luck egalitarian's discussion of option luck. Unlike luck egalitarians Anderson does not believe that you forfeit your right to protection/aid if you have a hand in making choices that result in your position of hardship.³⁹ Rather, Anderson posits that what matters is that you are in a situation that fails to reflect your equality and human dignity (which for our purposes is loosely tantamount to the idea that you are experiencing significant hardship) and in being left in that position, you are not being treated as an equal.⁴⁰ So whether it is an instance of brute or option luck is irrelevant. You should be helped either way because not to do so would fail to treat you as an equal and it would fail to respect your human dignity.

³⁸ She essentially undermines option luck in a different way to the way that I did in the above footnote.

³⁹ Morality should not be concerned with individual's choices when it advises on whether people should be helped or not. Morality “should uphold the responsibility of individual for their own lives without passing demeaning and intrusive judgments on their capacities for exercising responsibility or on how well they have used their freedoms” (Anderson, 1999:314). i.e. choice does not matter. Even if you make a bad choice, you should still not be left in hardship. “Starting-gate theories [i.e. luck egalitarian theories], or any other principles that allow law-abiding citizens to lost access to adequate levels of these goods are unacceptable” (Anderson, 1999:314).

⁴⁰ NB: Anderson's idea is implicitly presented as a morality for within a polis. It supports the idea of democratic equality between members of a state. However, I believe the same ideas about alleviating hardship so as to respect equality can be transposed onto a global setting. I will offer an reasons to believe that we should extend national morality to a global setting in Chapter 4.

In short, Anderson thinks that failing to recognise people's equality and human dignity is morally significant. In fact, it is wrong. Instances in which there is a failure to recognise these aspects of a person often correspond to instances of hardship such as those experienced by refugees. In this way Anderson's argument provides a deontological reason to think that the presence of hardship is problematic in and of itself. It provides a deontological grounding for the Wigginsian idea outlined in section 2.1. In this way Anderson indirectly provides arguments that question a legal definition that fails to recognise and support like cases of hardship. It also, arguably, provides reasons to ground a modified legal definition of the term 'refugee' in hardship.

Conclusion

At the beginning of this chapter, I showed that Wiggins argues that hardship is morally significant. Singer offers a consequentialist way to think about this significance of this hardship. His view places suffering and thereby hardship at the centre of morality. However, his consequentialist approach is subject to the criticism that it does not respect the separateness of persons, which means that it cannot support the idea of rights or uphold the notion of human dignity. So, while Wiggins showed that hardship as a result of compromised absolute needs is integral to the protection of refugees, which consequentialism defends, consequentialism fails to defend the individuals' claim to rights. As such, I abandoned consequentialism as a grounding for a definition of 'refugee' based in hardship to explore Anderson's deontological approach to the significance of hardship. Anderson focuses on respecting humans, in view of their human dignity, as equals. She suggests that morality dictates that we ought to protect people from hardship, as leaving persons in a state of hardship fails to respect their equality as persons and thereby the rights accorded them by virtue of their human dignity.

As Anderson's deontological approach is compatible with the presence of rights and upholding human dignity, it offers a more appropriate grounding for the hardship that was shown to be significant by the Wigginsian argument in the case of refugees. As such, in the following chapter I will proceed with the idea that hardship is morally significant and use it idea to modify the legal definition outlined in Chapter 1.

Chapter 3: Modified Definition

In this chapter, I aim to formulate a legal definition of ‘refugee’ that responds adequately to the moral significance of hardship. However, before I begin on this venture I must justify why the law ought to be changed to reflect the moral significance of hardship when there are other competing practical and prudential concerns that suggest that the law ought to be left as it is. §1. Will be devoted to this end.

I will begin by outlining some of these practical and prudential concerns. I will then explore Dworkin’s (1997) argument that can be used to show that moral concerns trump practical and prudential concerns in legal matters. I will suggest that even if one does not accept Dworkin’s argument that moral concerns are the primary concerns in relation to the law in general, they may have strong reasons to believe that moral concerns are primary (and practical and prudential concerns are secondary) in relation to refugee law. As a result of these reasons which will be explored below, I suggest that we have reason to suggest modifications to the law that eliminate its morally arbitrary distinctions by incorporating the sentiment of avoiding like cases of hardship into the law. As such, the remainder of this chapter will be devoted to devising such a modification to the law.

In order to formulate a definition of ‘refugee’ that responds adequately to the moral significance of hardship, I will begin by outlining an incredibly broad notion and narrowing it piece by piece until I reach what I believe to be the most morally appropriate definition of a refugee (§2 and §3). Then, in §4 I will offer a way of adding the sentiment of this moral definition to the current legal definition. Following this, in §5, I will defend this formulation against potential criticisms pertaining to: vagueness of key terms in the definition, convoluted formulation and a lack of temporal limitation. I conclude that the definition can be defended against theoretical criticisms.

§1. Morality and the Law

I have argued that the current state of the law draws morally arbitrary distinctions. It treats individuals fleeing different types of hardship differently; offering refuge to some and not others (Chapter 1). I then showed that hardship is morally significant (Chapter 2). If the law is to reflect morality, then the sentiment of avoiding like cases of hardship needs to be incorporated into the law.

One may ask why we should think that the law ought to reflect morality in this case, when other conflicting practical or prudential concerns are in play. Perhaps the gap between morality and the current state of the law can be justified on these grounds. In order to respond to this challenge I will apply ideas presented in Dworkin (1977) to the concerns under consideration.

I will begin by motivating this challenge in §1.1. I will offer some examples of practical and prudential reasons that states may have for maintaining the gap between law and morality in this instance. In §1.2. I will then explore Dworkin's suggestion that moral concerns trump practical and prudential concerns (such as those offered in §1.1) in relation to legal matters (Dworkin, 1977). Following this, in §1.3. I will show that even if one does not accept the Dworkinian suggestion that moral concerns trump practical and prudential ones in relation to the law in general, one may still think that moral concerns trump practical and prudential ones in the case of the refugee law under consideration. I will conclude that the moral concern of ensuring that refugees in like cases of hardship be protected by the law trumps competing practical and prudential concerns in this instance. As such, this gives us reason to suggest modifications to the law that eliminate its morally arbitrary distinctions.

§1.1. Motivating the challenge

There are a plethora of practical/prudential reasons that states can offer in favour of keeping the gap between morality and the law. Practical reasons tend to rely on states' recognition that expanding the definition of 'refugee' would likely commit them to accepting more refugees than they currently do, which could pose a number of practical problems. These practical problems serve as reasons for maintaining the gap between morality and the law. For example, states may believe that if the law is changed and they are legally required to admit more refugees, they may not be able to

support the increased financial strain on their budget. Essentially, states may believe that it is not economically feasible for them to admit an increased number of refugees and to support their current population. A further practical reason is that states may believe that there is insufficient space, or that there are insufficient resources to support the increase in population that would result from letting in refugees that apply to their country. An additional practical reason could be that people believe that low-income earners' jobs will be taken through the increase in competition from refugees attempting to work in the same jobs, which will also drive wages down. A final practical reason is that some states may believe that admitting refugees would result in the formation of ghettos and increased racial violence both of which would undermine the cohesion of the current population.

In addition to these practical reasons, there are prudential reasons that may be seen to justify the gap between law and morality. For example, states may feel that changing the law would commit them to an unknown increase in the number of refugees entering their country. They may feel that committing to this kind of unknown outcome is unwise. Another prudential reason may be that changing the law may impact on a state's relation with other states in an unknown way. This uncertainty may give that state another prudential reason to maintain the gap.

As such, there are a plethora of practical and prudential reasons to maintain the gap between law and morality. However, I believe that the moral concern of ensuring that refugees in like cases of hardship be protected by the law trumps these practical and prudential concerns. To support this idea I will begin by exploring Dworkin's *Taking Rights Seriously*, (1977) in the following section.

§1.2. Moral Concerns Trump Practical and Prudential Concerns in Legal Matters

Dworkin (1977) indirectly suggests that moral concerns, trump practical and pragmatic concerns as a rule in legal matters. Dworkin makes this suggestion using a distinction that he draws between what he calls 'principles' and 'policies'. Essentially, principles map onto moral concerns and policies track practical and prudential concerns. I will begin by explaining Dworkin's distinction in more detail.

According to Dworkin, *principles* are the kind of standard “that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality” (Dworkin, 1977:22). As such, I take it that moral reasons fall under the heading of principles. Contrastingly, *Policies* are: “that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community” (Dworkin, 1977:22). I take it that this group captures practical and prudential reasons in that it captures economic political and social improvement.

Dworkin observes that, in normal circumstances, principles take precedence over policies in legal matters (Dworkin, 1977:91-92).⁴¹ He suggests that political decisions aim to protect a principle even when doing so does not advance any other political aim and/or protecting the principle undermines some other political aim such as a policy (Dworkin, 1977:91). Furthermore, Dworkin suggests that in normal circumstances, it is not possible to compromise a principle in a legitimate way. Consequently, they are upheld wherever possible (Dworkin, 1977:92). Policies on the other hand can be compromised when they come into conflict with a principle or when they come into conflict with one another (Dworkin, 1977:91-92). Essentially, when a principle comes into conflict with a policy in normal circumstances, the policy is compromised in favour of protecting the principle.

In order to understand why Dworkin’s work is relevant for this discussion, we need to look past his language and remember that principles pertain to moral concerns and

⁴¹ However, in some urgent circumstances, policies may trump principles. Essentially, “one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts” (Dworkin, 1977:92). It is important to note that this case is an *exception* to the rule that principles trump policies. This exception only eventuates in extreme circumstances. We can see this when Dworkin stipulates that a “political aim [is not] a right unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency” (Dworkin, 1977:92). Dworkin argues that it follows from the definition of a right that it cannot be outweighed by all social goals” (i.e. policies) (Dworkin, 1977:92). As such, it is clear that principles trump policies in normal circumstances for Dworkin.

policies pertain to other concerns such as practical and prudential concerns. Here we can see that he observes that in normal circumstances moral concerns trump practical and prudential concerns in relation to legal matters.

The reason we should lend credence to Dworkin's interpretation of the weight of moral concerns in comparison to practical and prudential concerns is that he is not offering a mere theoretical construct. He is offering a theoretical interpretation of the way that he sees these concerns being weighted in legal systems in the real world.

I will now discuss the implication of Dworkin's observation that moral concerns trump practical and prudential concerns in the law in general for our argument. If we accept Dworkin's observation, then we have reason to think that states' moral concern of offering refuge to people in similar states of hardship ought to trump other competing practical and prudential concerns (as it does with the rest of their laws). This is because we have shown that Dworkin's observation suggests that moral concerns trump these other concerns in the law in general. We have no reason to think that refugee law would fall outside of the scope of Dworkin's argument (i.e. that it would have a different weighting of moral and practical and prudential concerns).

§1.3. What are Trumps in Relation to *This* Law?

However, if one does not buy Dworkin's view that moral concerns trump practical and prudential concerns in relation to the law in general, then perhaps they will accept that moral considerations trump practical and prudential ones in relation to the law under consideration.

There are three reasons that one may think the law under consideration is a special case in which moral concerns are particularly significant. The first concerns the area of law that is under consideration, the second pertains to the motivation of signing the refugee convention in 1951 and the third is a matter of consistency.

First, the law under consideration is part of international humanitarian law. It is directly connected with issues of human rights. Humanitarian law and human rights law are even more closely bound to morality than other areas of law. They protect individual's rights (such as the right to refuge) against situations in which states

would allow their practical and prudential concerns to get in the way of upholding those rights. As such, even if you don't think that moral considerations ought to trump practical considerations in relation to general areas of the law, you might think that they do in relation to international human rights law.

Second, states are typically party to the convention because they aim to help protect refugees.⁴² In most cases, the primary motivation for engaging with this convention is humanitarian. There is little to be gained by committing your country to accepting refugees. From a self-interested perspective, most states would be better off not signing a convention that committed them to accepting certain people. They would be better off choosing who, when and how many people to accept as the opportunity arose. As such, in most cases, being party to this convention reflects states' decision to prioritise the moral concern of protecting refugees over other competing practical and prudential concerns in relation to this law. It seems reasonable to assume that in relation to this law, states would have reason to continue prioritise moral concerns over practical and prudential ones.

Finally, there is a matter of consistency at issue here. States that are party to the 1951 Convention have already shown that they are receptive to changes in the scope of protection of refugees. This can be seen in the Preamble of the Convention they signed.⁴³ The Preamble of the 1951 Convention contains the following commitments (among others):

“Considering that it is desirable to advise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of new agreements” (1 and 3, Preamble, UNHCR, 1951:13).

⁴² There are other geopolitical reasons that may have motivated some states to sign this convention. An example could be that some states may have signed the convention so as to not incur the disapproval of other more humanitarian-minded states that signed it for more altruistic reasons.

⁴³ It is important to note that signatory states are not legally bound by the Preamble. However, it represents the general purpose underlying the convention and is used as guidance for how the legally binding aspects of the Convention ought to be interpreted.

From this we can see that when signatory states signed the convention they were receptive to the idea that the scope and protection of refugees could be extended. In stating this in the preamble states indicate a commitment to the moral concern of extending the scope of refugee protection to appropriate persons. If signatory states are to maintain consistency within the Convention they ought to remain committed to this moral concern and increase the scope of protection of refugees to include individuals in like cases of morally significant hardship despite the cost of undermining some competing practical and prudential concerns.

As such, there are several reasons that one may think that this area of refugee law is a special case in which moral concerns are particularly significant. Even if one does not accept Dworkin's suggestion that moral reasons trump practical and prudential ones in normal circumstances, one still has reason to believe that they do in this instance. As such, I conclude that we have clear reason to believe that the moral concern of ensuring that refugees in like cases of hardship be protected by the law trumps competing practical and prudential concerns in this instance.

Where does this leave us? In Chapter 1 I showed that the current state of the law draws morally arbitrary distinctions between like cases of hardship. In Chapter 2 I showed that hardship is morally relevant. As such, there is a gap between morality and the current state of the law. There are moral reasons to amend the law and close this gap and there are practical and prudential reasons to keep it as it is. In this section I showed that we have reason to believe that moral concerns trump competing practical and prudential concerns when in relation to this law. As such, I posit that we have reason to suggest modifications to the law so as to eliminate its morally arbitrary distinctions in it by incorporating the sentiment of avoiding like cases of hardship into the law.

§2. Finding a Moral Definition of 'Refugee'

Before a modification to the legal definition of the term 'refugee' can be suggested I must determine what a moral definition of the term would look like. I will now attempt to formulate this moral definition. To do this, I will begin with a broad notion and will narrow it one aspect at a time, until the ideal definition is reached. This process will not only allow me to reach the most appropriate definition, but it will

also allow me to highlight features that distinguish refugees from other types of immigrants along the way.

Let us begin with the notion of “*a person who moves into a country that they are not a national of for the purpose of settlement*”. There are different reasons that someone could move to a country that they are not a national of for the purpose of settlement. Some people move freely, while others move as a result of an external compelling factor. Refugees move as a result of an external compelling factor.⁴⁴ As such, this initial notion needs to be modified so that it includes the compulsion of an external compelling factor.

As such, a working definition of a refugee could be: *A person who, as a result of an external compelling factor, moves to a country that they are not a national of, for the purpose of settlement.*

However, this is still not narrow enough. There are some cases in which people are compelled to migrate as a result of an external factor, which we would not want to count as refugee cases. For example, we would not want to call the following case a refugee case, even though the individual has an external factor compelling her to migrate.

Imagine a young Australian academic named Jill who is the primary caregiver of her disabled sister. The Australian government changes its healthcare policy, which will result in cuts to her sister’s healthcare subsidies. These cuts will not render her and her sister bankrupt, but they will severely compromise their current quality of life. As such, Jill sees emigration as her most viable option to maintain their standard of living. Consequently, she feels compelled to leave Australia. She moves to the UK on a working visa to work at the London School of Economics accompanied by her sister as a dependent.

⁴⁴ Note “external compelling factor” is a vague phrase. I will attempt to explain what is meant by this phrase more fully below in terms of severe hardship and a lack of reasonable alternatives. The notion was drawn from definitions found at (International Organisation for Migration, 2004).

The compelling external factor in this case is the policy change that will result in cuts to healthcare subsidies. This is *compelling*, as Jill is required to care for both her sister and herself. These healthcare cuts will substantially reduce the subsidies she and her sister receive, which will drastically reduce their income and quality of life. There has been an *external* change that threatens their present economic standing. As a result she feels compelled to leave Australia and move to a country with a more stable welfare system.

However, the mere presence of this external compelling factor does not appear to be enough for us to count her as a refugee. What is the difference between Jill's case and those who we would like to include in our definition of a refugee? The difference is threefold: a) In Jill's case, the catalyst compelling her to leave is not actually severe, b) she has other options available to her and c) that unlike a refugee, Jill is not claiming refuge from the destination state.

Let's begin with a) *Jill is not in severe hardship*. The healthcare cuts resulting from the policy change will not plunge Jill and her sister into bankruptcy. If they were to remain in Australia their current standard of living would be compromised. They would need to move into a smaller house and Jill may need to leave her academic job in search of more lucrative employment. Although none of this is ideal, it does not constitute a case of severe hardship.

An example of a corresponding situation that would count as a case of severe hardship would be one in which the individual had a much lower income to begin with, or no income at all. Their government cut healthcare subsidies and no NGOs or charities were available to support them. As a result, they lost their home and were unable to afford basic necessities such as food, water and shelter.

We know from our discussion of Wiggins in Chapter 2 that hardship is morally significant because morality will protect human needs. Severe hardship is the result of a denial of absolute human needs. As such, it should play a primary role in our definition. Thereby, this difference between Jill and those we want to count as refugees is of paramount importance.

Furthermore, *b) Jill has other options available to her, other than immigration*. It seems she still has a choice about whether or not to leave the country as a consequence of the external factor. There are reasonable alternatives available to her. Even though these other options are far less feasible than moving to another country such as the UK and gaining immediate access to their health services through the NHS. For example, she could quit her job in academia and move into a profession that is more lucrative. Alternatively, she could also try the less promising route of attempting to convince the government to reconsider its policy change in a number of diverse ways: she could lobby the government directly for a change of policy or she could challenge their original policy decision through the judiciary system on the grounds of anti-discrimination. Even though none of these options are hugely appealing, there are alternatives available to her. After all, she is not in any direct danger at the present moment. She will simply have a significantly reduced income.

A typical example of someone who we believe counts as a refugee is someone who will face hardship, often in the form of persecution or violence, if they remain in their country of residence. They have no reasonable alternative but to emigrate. Jill, on the other hand, does have a choice. She has alternatives that enable her to remain in the country.

Another distinguishing feature between Jill and someone we would want to count as a refugee, is *c) that unlike a refugee, Jill is not claiming refuge from the destination state*. Jill moves to the UK on the grounds of her newfound employment at an academic institution. She does not need to claim refuge in order to be let in. She fulfills other migration criteria (she is on a working visa) and can be let in on the basis of that fulfillment. Contrastingly, the refugee is claiming refuge from the state. Irrespective of whether they fulfill other migration criteria, the element of their application that allows them admittance as a refugee is that they claim refuge.

Having highlighted three key differences between refugees and individuals like Jill, we must again consider how the definition ought to be narrowed so that people like Jill are excluded from it, while those we want to count as refugees are not. This example has shown that a refugee, unlike another kind of migrant must be in severe

hardship, have no real alternative to leaving as a result of the external compelling factor and be claiming refuge from the destination state.

As such, I suggest the following three modifications to our moral definition: add in “severe hardship”, “no reasonable alternative” and “make a refuge claim against [the state]”. The complete moral definition would read:

A person who, as a result of an external compelling factor, has no reasonable alternative, as a consequence of being in severe hardship but to make a refuge claim against a country that they are not a national of and move to⁴⁵ that country, for the purpose of settlement.

§3. What the Moral Definition Says by Omission

So far I have been focusing on what the moral definition says. Now I think it is time to look at what the moral definition omits. That is, I will explain two aspects that the moral definition actively avoids specifying.

First, the definition does not stipulate whether settlement refers to temporary or permanent residency. As such it allows for the term ‘refugee’ to include those seeking both kinds of residency. It is a common misconception in the West that all refugees are seeking permanent residency in the destination country.⁴⁶ Often people only wish to remain abroad until the cause of hardship in their country has been eliminated. For example, many Syrian refugees in Jordan are likely to wish to return home if the conflict ends. They are simply seeking protection there in the interim conflict period. “More than 65 per cent of refugees surveyed by Oxfam fear they may not be able to go back to Syria despite desperately wanting to return... Oxfam researchers surveyed 151 households of refugees in three areas of Jordan representing 1015 people. ...the overwhelming majority of refugees *want* to return to Syria” (Oxfam, 2014). As such, in some cases refugees are only seeking temporary residence.

⁴⁵ Note that “move to” has been repositioned within this formulation of the definition.

⁴⁶ The underlying worry is that refugees are coming from poor countries seeking a ‘better lot’, in some way at the expense of those already living in the destination country. In response to this, it is important to note that not all refugees come from ‘poor’ countries. Many refugees come from economically prosperous circumstances and are fleeing due to some other kind of hardship such as violence.

However, in many cases refugees are actually attempting to permanently resettle in the destination country. One reason they may want to do this is that the conflict simply does not end before they are settled and entrenched in their new country. Another reason may be that they would be in continued danger if they were to return to their country of origin because, for example, the government they fled from is still in power. Another reason could be a combination of factors pertaining to a deeper threat (such as one of the above) and a life style improvement.

As such, my definition of a refugee needs to capture individuals seeking either permanent or temporary settlement. To do this, I have kept the definition broad saying that they “*move to a country that they are not a national of, for the purpose of settlement*”. Here “settlement” can be interpreted as either temporary or permanent.

Another purposeful omission in this moral definition is that, in contrast to the original legal definition, my proposed moral definition does not stipulate that the person needs to be ‘outside’ of the country of origin for them to count as a refugee. This was not an oversight, but rather, a deliberate choice.

There are advantages and disadvantages pertaining to this choice. Failing to stipulate that the person is outside of the country of origin means that our definition of a ‘refugee’ moves further away from the common usage of the term. When one thinks of a ‘refugee’, they imagine someone who has reached the border of their country of origin and that they are claiming assistance, either from a bordering country’s camp, or are attempting to make it directly to a destination country. We do not think of someone who is still in their original geographical location in their country of origin experiencing the hardship. As such, failing to stipulate that the person is outside of the country of origin appears to move the definition away from the common usage of the word.

However, perhaps it does not move the definition far from the common usage. Perhaps the common usage does not require movement, but simply the desire for movement. It is often insurmountably difficult for refugees to move from one location to another. Often the opportunity cost of moving is too high. For example, if they are

captured, they may be tortured or executed. Or perhaps their families will be punished if they leave. If hardship is the key, as I have been suggesting, then perhaps the desire to move is sufficient for an individual to count as a refugee. If one is experiencing/is likely to experience hardship, then this usually engenders a desire to move, even if there are other factors compelling the individual to stay. It would seem inappropriate to rule people out of the definition of 'refugee' simply because they have been placed in a difficult situation in which the opportunity cost of leaving the hardship is simply too high. As such, I believe that the desire to move is sufficient for someone to count as a refugee and actual movement ought to not be required. As internal refugees would have the desire to move, even though they have not achieved actual movement, I believe that they come close enough to the common usage of the term.

Even if you do not buy this desire-based approach, and you believe that my inclusive definition has moved too far from the common usage of the term, there are also instrumental reasons to adopt my definition in spite of this disadvantage. For example, if the definition is broadened in this way, then individuals who are experiencing like hardship, just in different geographical locations/jurisdictions (Internally Displaced Persons and those who have not moved at all), will both be covered under the definition and will consequently be covered by states' corresponding obligations.⁴⁷ If hardship really is what matters as I argued in Chapter 2, then it seems that such an inclusion is warranted in light of the similar levels of severe hardship. Currently both Internally Displaced Persons and those who have not moved are left under the jurisdiction of the country of origin and other states are not obligated to protect them, even if the government in the country of origin is the cause of their hardship (UNHCR, 2015b).

Another reason to think that the instrumental inclusion of internally displaced persons and individuals who have not moved experiencing the same level of hardship in the definition of the term refugee may be legitimate is to consider the fact that the UNHCR already effectively treats internally displaced persons as if they fall under the

⁴⁷ Note I have gone some way to motivating the idea that differences in geographical location not as morally relevant (if they are relevant at all) as hardship concerns in section 1.3. I will not repeat those arguments here but please refer back if further support is required.

definition. The UNHCR attempts to assist Internally Displace Persons under what is known as the ‘cluster approach’ (UNHCR, 2015b). The UNHCR groups refugees and internally displaced persons together, largely as a result of their recognition of the similarity in hardship between refugees and internally displaced persons. I posit that if individuals who have not moved at all experience the same level of hardship and assuming that hardship really is what matters, as from Chapter 2, then perhaps the disadvantage of moving a little too far away from the original meaning ought to be accepted.

As such, whether because of the desire-based approach, or because of the more instrumental reasoning outlined above, my definition omits the stipulation that the individual has to be outside of the country of origin to count as a refugee. This omission means that individuals who have not moved from their original geographical location can be included in the definition. Now, where do we go from here? We have a rather clunky definition that captures those who we want to count as refugees and excludes the rest. The next step is to work out how to input the moral definition into the original legal definition.

§4. A Modified Legal Definition

Now I will modify the legal definition from section 1.1 so that it captures the sentiment expressed in the moral definition I have developed. The reason I am returning to modify the original legal definition is that this is the most realistic move to make if the definition is to be palatable to policy makers. A new definition of refugees is more likely to be accepted if it simply alters the one that currently exists, rather than attempting to replace it with an entirely new one. Too drastic a departure from the current legal definition would move it out of touch with the current legal/political climate and in doing so, significantly limit its likelihood of implementation.

As such, I will now look at how we can modify the current legal definition such that it captures the sentiment of the moral definition above.

To recall in the mind of the reader, the current legal definition states:

That a refugee is someone who: “owing to well-founded fear of being persecuted⁴⁸ for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

- a) outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
- b) or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (CSR 1951, Article 1(2)).⁴⁹

My moral definition states:

A person who, as a result of an external compelling factor, has no reasonable alternative, as a consequence of being in severe hardship but to make a refuge claim against a country that they are not a national of and move to that country, for the purpose of settlement.

Here is how I suggest that we combine the two:⁵⁰

*A person who, **as a result of being in severe hardship**, or owing to a well founded fear of **being in severe hardship** is:*

- a) *outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;*
- b) ***or who is currently still within his country of nationality but has no reasonable alternative but to move outside the country of his nationality”;***

⁴⁸ Note the clause that limits the definition to those who are in their present situation “As a result of events occurring before 1 January 1951” was removed from the current legal definition by the 1967 Protocol (CSR 1951, Article 1(2)).

⁴⁹ Note the letter-alignment has been added to help clarify the original legal definition and its comparison to the modified version, which follows. This lettering is not part of the law as it is stated in (CSR 1951, Article 1(2)).

⁵⁰ Note the bolded sections are the changes I have made to the legal definition.

- c) *or who, not having a nationality and being outside the country of his former habitual residence as a result of such events **or circumstances**, is unable or, owing to such fear, is unwilling to return to it;*
- d) *or who, not having a nationality and being currently still within the country of his former habitual residence as a result of such events or circumstances, has no reasonable alternative but to move outside the country of his former habitual residence (CSR 1951, Article 1(2)).*

And, makes a refuge claim against a country that they are not a national or former habitual resident of.

§5. Potential Criticisms of the Definition

There are several criticisms that can be raised against this formulation of my amalgamated moral-legal definition. I will now explore the most serious ones. I will explain which of them can be overcome. I will show that the criticisms that cannot be overcome do not cause a significant problem.

§5.1. Criticism 1: Vagueness of Key Terms

An obvious first criticism of this definition is that its key terms are vague. This is also a problem for the original legal definition in relation to phrases such as “well-founded fear”. It raises the questions: In virtue of what is the fear well-founded? From whose perspective is the fear well-founded? etc. Vagueness of terms is even more problematic in my definition as I have one particularly vague phrase “severe hardship”.

I will attempt to specify the meaning of “severe hardship” a little further. ‘Severe’ is defined by the Oxford English Dictionary as: “Of pain, suffering, loss, or the like: Grievous, extreme” (OED Online). It is also defined as: “Of events or circumstances, labour or exercise, a struggle or contest, a test, trial, etc.: Hard to sustain or endure; making great demands on one's powers or resources; arduous” (OED Online). I mean it largely in terms of “[g]rievous, extreme” hardship, which is consequently “a struggle or contest, a test or trial etc.: Hard to sustain or endure” (OED Online).

‘Hardship’ is defined as: “A condition which presses unusually hard upon one who has to endure it; hardness of fate or circumstance;... [significant]⁵¹ toil or suffering; extreme want or privation” (OED Online). I focus mainly on the “[significant] toil or suffering; extreme want or privation” section of the definition. So ‘severe hardship’ essentially means: “[significant] toil or suffering; extreme want or privation” which is “[g]rievous, extreme”.

This goes a little way in explaining “severe hardship”. However, “severe” is still quite vague, for two reasons. ‘Severe’ is a graded term and it is perspective relative. First, let’s explore the notion that it is a graded term.⁵² This essentially means that it operates on a scale. Something can be more or less severe. For example, both x and y can count as severe but x can be far more severe than y. This creates ambiguity. Exactly how “severe” a person’s hardship needs to be for them to count as a refugee is ambiguous. Is there a threshold cut off at which something is sufficiently grievous to count as severe? Or does any amount of grievousness show the presence of severity? If there is a threshold, what would that threshold be? This brings me to my second worry.

I believe that the degree to which something must satisfy a graded term in order to count as sufficiently satisfying it is often a matter of perspective. This means that the severity required for an individual’s hardship to be severe enough to allow them to fall under the definition of a refugee may be a matter of perspective.⁵³ Some may think that a higher level of “grievousness” or “struggle” is required for a particular case of hardship to count as “severe” than others. As such, whether or not the

⁵¹ “severe” is used here in the OED definition rather than “significant”. However, to avoid confusion resulting from discussing my use of the term ‘severe’ and “severe” as an element of the OED definition of ‘hardship’, I have substituted in “significant” in the place of “severe” in the OED definition of “hardship”.

⁵² Note, the definition of ‘hardship’ also contains graded terms and is thereby problematically vague. For example, “extreme” in “extreme want or privation” is graded. There are different amounts of “extreme”. Something can be more extreme than something else and yet both can still count as “extreme”. However, ‘severe’ is *itself* a graded term, making it even more obviously problematic in terms of vagueness. As such, that will be my focus.

⁵³ It is important to note that elements of the definition of ‘hardship’ are also perspective relative and consequently encounter similar problems pertaining to ambiguity.

hardship is “severe” can often depend upon *who* is judging the severity. As a result, when this definition is considered within the context of the law, the question arises: does the definition mean that if the circumstances appeared severe to the individual then they can qualify as a refugee? Or does it mean that the circumstances were severe from the perspective of the destination country? Or that they were in some way objectively severe? Clarity of the relevant perspective is required here.

Another problematic instance of perspective relativity in my definition is that of ‘reasonable alternative’. “Reasonable alternative” is problematic in the same way that “severity” is problematic. As whether or not something is “Grievous, extreme” is a matter of perspective, whether or not “reasonable” alternatives are available also seems to be a matter of perspective. For example, some may consider staying in Gaza despite air-raids to be an admissible option, while others may judge that this is not a viable option and argue instead that there is no reasonable alternative but to move to another country. As such, what counts as a ‘reasonable alternative’ is ambiguous and ambiguity within the law is problematic.

This perspective relativity is problematic for the legal definition as it could mean that the law is ratified and interpreted in case law differently in different countries. This would create different precedents in different countries. The result of this is that people in like circumstances could count as refugees in one country but not in another. This is a significant problem for the application of the law fairly across countries. This is something we should definitely try to avoid when reforming the definition.

As such, I accept that there is a level of ambiguity in the formulation of my definition. However, it is worth noting that most laws have a level of ambiguity. I have also gone some way to eliminate the present ambiguity in explaining how “severe hardship” ought to be interpreted in line with the OED definitions of both words.

§5.2. Criticism 2: Convoluted Wording/ Unclear Grammar

Another criticism that could be made of my definition is that one could very reasonably argue that the layout of the definition is convoluted. I would accept this criticism and agree. However, I argue that this is the result of the convolutedness of

the original legal definition. The entire article is contained within a sentence. There are several qualifications made within this sentence, which results in the need for an over-use of punctuation. This is rather hard to follow. My moral definition needed to be added to this existing legal definition. As such, I split it up and added it to different parts of the existing sentence. This naturally made the sentence longer and in doing so, arguably more convoluted. I attempted to counteract this by breaking up the sentence using lettered sections (e.g. a,b,c). I believe this move increased clarity. However, it is still imperfect as a result of the state of the original definition. So essentially, I accept the criticism that the definition lacks clarity, but argue that it is as clear as it could have been given the starting point.

5.3. Criticism 3: No Temporal Limitation

Another criticism of my definition is that the well-founded fear of being in severe hardship does not have a temporal limitation. The modified definition simply states: “owing to a well founded fear of being in severe hardship...”. The “well-founded fear” may be a fear of something that will happen in the distant future. Is the fact that it is well-founded enough to warrant refugee status being granted *now*?

In response to this one may argue that the original legal definition has a similar byproduct. It states: “*owing to well-founded fear of being persecuted*”. Why does this worry seem more significant in the modified definition case? Perhaps because of an underlying worry that “hardship” captures far more cases than “persecution”. Having no temporal limitation in this case is more dangerous. For example, this definition may capture the following case. Imagine Dean is living close to the poverty line. He reasonably foresees that he is likely to lose his job, which is currently keeping him above the poverty line. When that happens, let’s say it is reasonable for him to assume: he will not get another job, no charities are available in his area, he does not have the means to relocate to an area with assistance and he will slip slowly into starvation. Eventually he will be in the kind of “severe hardship” stipulated by the modified definition.

Despite the fact that Dean’s fear of this eventual outcome is well-founded, allowing him to fall under the definition of a ‘refugee’ *now* is likely to be rather unpalatable for many signatory countries; perhaps in a way that someone who is likely to experience

persecution in the same time frame is not. This is perhaps because of states' worry about how many individuals would then fall under the definition of the term 'refugee'. Economic refugees are included in the modified version. If "well-founded fear" is atemporal in the original definition, this only increases the number of refugees by the number who are likely to be persecuted in the future. If it is atemporal in the modified definition, it increase the number to include not only those who are likely to be persecuted in the future, but also those who are likely to starve. This economic category would likely include far more people than the persecution category. As such, I can understand why states would be reluctant to adopt the modified definition whilst the atemporality of the original definition is maintained, given the likelihood of a large increase in claimants.

I am in no way justifying the disparity between the acceptability of atemporality in relation to persecution cases and economic cases. As I have said above, I believe that the cause of the "severe hardship" is morally irrelevant. However, if it will make the modified definition more palatable to signatory states, then an "in the immediate future" clause could be added, such that it reads: "owing to a well-founded fear of being in severe hardship in the immediate future". This would remove the atemporality and limit the definition to cases of immediate threat, thus making it slightly more appealing to states.

§5.4. Summary

In summation, there are several criticisms that can be made against my modified version of the legal definition. It contains ambiguous terms, is convoluted in its layout, it perhaps moves too far away from the common use of the term 'refugee' and it had no temporal limitation placed on the "well-founded fear". I have addressed each of these concerns in turn and have shown that either they are to be expected given the pragmatics of the legislating process, or they are to be expected given the state of the original definition, or I have shown how the definition can be further modified to overcome these criticisms. As such, I believe that this definition stands up in light of potential criticism.

Conclusion

In summary, in this chapter I formulate a broader legal definition of the term ‘refugee’ that is hardship-focused. Before embarking on this venture I offer a justification for suggesting modifications to the current state of the law, despite practical and prudential reasons that suggest that the law ought to remain the same. Following this justification, I attempt to formulate a moral definition of the term ‘refugee’, which is then used as a basis for a modification to the legal definition of the term. Unlike the original legal definition, this modified definition avoids drawing morally irrelevant distinctions between people in similar cases of severe hardship.

My definition changes the current legal definition in two main ways. First, it is *hardship-focused*, rather than being purely persecution-based. Second it is *broader* than the current legal definition in two main ways. It includes individuals experiencing equal severity of hardship, even when it is not the result of persecution. This means that it includes economic as well as political refugees. More controversially, it includes people who are experiencing the same kind of hardship but who have not been able to move out of the country in which the persecution is occurring. After setting up this definition, I then examined potential criticisms that it may encounter pertaining to: vagueness of key terms in the definition, convoluted formulation and a lack of temporal limitation. I concluded that the definition stands up in spite of these criticisms. Having posited my proposed definition, in the following two chapters I will explore obligations that flow from this modified definition.

Chapter 4: Obligations – To Whom Are States Obligated?

In this chapter I will begin my two-part exploration of states' moral obligations to refugees that flow from the modified definition I presented in the previous chapter. States are obligated to refugees as a result of the moral significance of the hardship they experience.

This chapter begins the exploration of these obligations by asking: to whom are states obligated? Here I will examine the various ways of differentiating between different types of refugees. The law currently distinguishes between different types of refugees in terms of what I call: 'category', 'location' and 'level'. I will first explain what each of these terms mean. Then I will look at how the law draws these distinctions. Finally, I will make a normative argument about which of these characteristics of refugees are morally relevant. Those that are morally relevant ought to lead to different obligations. Those that are morally irrelevant should not. I will argue that only level is itself morally relevant and that category and location are only relevant in so far as they reflect a difference in level.

§1. The Terms Used to Differentiate Between Refugees

The current state of the legal definition implicitly draws distinctions between refugees. I will focus on three of these distinctions. I argue that the law differentiates between different sorts of refugees based on what I have called their category, location and level.

Category refers to the cause of the migration of the refugee. That is, whether the refugee is fleeing their country of origin due to dire economic circumstances, fear of physical or mental persecution resulting from external sources or internal sources such as civil war, etc.

Location refers to the geographical location of the individual when they make their claim for refuge from another state. Some claim refuge directly from the destination country when they arrive. These are called *asylum seekers*. For example, if someone flees Syria and flies to Australia and claims refuge upon arrival in Australia, then they are an asylum seeker. Others claim refuge from a third party country once they have reached an intermediary camp. For example, imagine someone who flees Syria into a refugee camp in Turkey. From there they claim refuge from Australia. They are known more broadly as a *refugee seeking resettlement*.

Finally, the *level* of refugee refers to the intensity of their hardship. This can be cashed out in terms of: a) the severity of persecution/economic turmoil they are experiencing and b) the level of risk associated with their continued exposure to the cause of hardship. For example, their likelihood of death if they remain at the site of hardship un-aided.

§2. Legal Differentiation

I argue that the law currently differentiates between refugees in relation to: category, location and level. Consequently the law differentiates states' *obligations* based on the category, location and level of the refugee in question. In relation to category, only people fleeing *persecution* are covered by states' obligations. In relation to location, states have *more* obligations to asylum seekers than to refugees seeking resettlement. In relation to level, the law implicitly suggests that individuals have to be experiencing a reasonable amount of persecution to be covered by the law and have states subsequently obligated to them.

§2.1. Category

First, let's examine how the law treats the notion of 'category'. The law currently differentiates based on category. As we saw in Chapter 1, it only protects those who fall into a specific category: namely *political refugees* who are experiencing persecution from a specific set of sources (race, religion, nationality, or membership of a particular social group or political opinion). This specific sub category is the only kind of refugees that falls under the legal definition of the term 'refugee'. As such, these are the only refugees that states are legally obligated to offer refuge to.

Even some sub-categories that we would think count as political refugees are not covered by the definition and are therefore states are not legally bound to admit them. For example, the law does not cover those experiencing persecution as a result of their sexual preference. Furthermore, refugees falling under the category of economic refugees are certainly not covered by the definition. As such, refugees who experience hardship in the form of starvation for instance do not fall under the current legal definition and consequently states are not legally obliged to help them in the same way. In sum, the current state of the law only obligates states to a specific sub category of political refugees.

2.2. Location

Furthermore, the law currently differentiates based on location. That is, states have more obligations in relation to asylum seekers (that is, those who apply from the destination country) than they do in relation to refugees seeking resettlement (those who apply from a third party camp).

If an asylum seeker arrives on a signatory country's shore and they are shown to be a genuine refugee, then the country in question is obliged to accept them. "Under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol... people who arrive in a state and claim to be refugees must be given a fair hearing to determine whether they are in fact refugees and, if they are, must be permitted to stay" (Carens, 2003:101). Essentially, asylum seekers who qualify as refugees normally have the legal right to stay. They are also "entitled to procedural protections of various sorts in establishing that claim, while those who seek entry as refugees from outside have few or no legal entitlements even to consideration" (Carens, 1992:35).⁵⁴

However, a refugee seeking resettlement facing the same kind and level of hardship in their country of origin, seeking refuge from a destination country from within a camp would not be protected by the same obligations. That is, states would not be obliged to accept them into their borders and their access to legal procedural protections in

⁵⁴ Furthermore, states are obligated to accept asylum seekers and their close family relatives, while they have discretion in which if any refugees seeking resettlement to accept.

establishing a claim is not secured. How many and which ones are accepted is a matter of discretion. There are some limits on the discrimination they are allowed to employ when determining which refugees seeking resettlement they will admit (Carens, 2003:110).⁵⁵ This means legally, each state can choose which, if any refugees seeking resettlement they admit.

§2.3. Level

Finally, the law implicitly differentiates based on level. That is, it implies that individuals need to be experiencing a significant amount of persecution, not just a marginal amount for them to count as refugees.

Imagine a case in which a child is being bullied at school. They are being persecuted, in a sense, by an older student. This persecution takes the form of name-calling, theft of lunch money etc. Imagine that the headmaster does not intervene in cases of bullying and the child's parents cannot fix the situation. Further still, imagine, for the sake of the thought experiment, that there are no alternative schools without bullies who would target them in their country/leaving school was not an option.

Destination countries would not consider this child's level of persecution/hardship to be great enough for them to count as a refugee if they claimed refuge. Even if the child had no other choice but to leave the country if he wished to avoid being bullied, the level of persecution entailed in the bullying would likely be considered too minimal.

There is no threshold of persecution written into the convention. Nor is there any clear threshold in domestic ratifications of this law as far as I can tell. However, domestic

⁵⁵ States *can* choose not to admit based on: national security threat (I think this is even the case with asylum seekers and close family members), the presence of a significant criminal record, financial need of the refugee, medical conditions (i.e. whether the refugee has contagious or communicable diseases which may place "unusually high demands upon the health-care system", economic potential, broader family ties – distant relatives, cultural affinities (pertaining to coherence with official languages which facilitates integration) and ethnic ties (which are distinct from cultural affinities as they refer to long standing generational ties (Carens, 2003:105). However, states *cannot* discriminate based on: race, religion, ethnicity and sexual orientation, as in other areas of the law. (Carens, 2003:110).

ratifications do often spell out the kinds of persecution/hardship that *would* be grounds for refuge. These are all cases that contain a high level of persecution/hardship.

For example, Australia's Migration Act (1958) suggests that Australia only lets in refugees who are being persecuted in a way that "involves 'serious harm' to the person" (Migration act, 1A(2) as from Australian Law Reform Commission, 22.8). "[I]nstances of 'serious harm'" as outlined in the *Migration Act* 91R(2) (1958) include, but are not limited solely to, "a threat to the person's life or liberty; significant physical harassment of the person; significant physical ill-treatment of the person; significant economic hardship that threatens the person's capacity to subsist; and denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist" (Australian Law Reform Commission, 22.8). We can see from this list that all of the listed instances contain a significant level of hardship.

Unfortunately there is not a more globally focused reference to point to here that would show that the law does in fact take level into account. However, I hope that the thought experiment and reference to domestic ratification in an example country will suffice.

In summary, the law explicitly differentiates based on category and location. A refugee needs to be of the political category varied to be covered by the current definition. Furthermore, if a refugee makes a claim from the doorstep of the destination country, states have greater obligations to them than if they applied from a third party country's camp. Finally, the implicitly differentiates based on level in that only those who experience a sufficient level of persecution can count as refugees.

§3. Normative Differentiation

I argue that we ought to differentiate based on level, as it is a morally relevant distinguishing feature. However, we ought not differentiate based on category and/or location (in so far as they are distinct from level), as, although they are distinguishing features, they are not *morally relevant* distinguishing features.

First, I will explain why I think differentiation in terms of level is morally relevant. We showed in Chapter 2 that hardship itself is morally relevant. Level tracks the amount of hardship encountered, or the amount likely to be encountered, by the refugee. As such, it is a distinguishing feature that maps on to a morally relevant distinguishing feature between refugees. Some levels of hardship are just too minor to outweigh a state's interest in freely determining its own immigration policy. It may be reasonable for states to not allow individuals experiencing such low levels of hardship to live in their country. Another reason that level may be relevant is that it is arguable that states are not in a financial/political position to help everyone fleeing any level of hardship when there are apparently too many of the more dire cases in which people are fleeing persecution for them to cope with. If states can only help some refugees due to resource/space limitations, then they need to help those who have the greatest level of hardship first because it is the morally relevant distinguishing feature. In sum, because level is morally relevant and there are sometimes resource constraints, it is reasonable for the law to differentiate based on level.

Second, contra the current state of the law, I argue that the law ought not to distinguish between refugees based on category. Unlike level, category is morally irrelevant. As I showed in Chapter 1, from a moral perspective, what matters is that the same amount of hardship is experienced. The cause of the hardship should be largely irrelevant. As we saw from Anderson (1999) in Chapter 2, if two people are in need, what is relevant is who is in greater need at that moment, not what caused them to be in need in the first place. What matters is the level of hardship they are experiencing; not its cause. As such, I argue that it is morally irrelevant whether someone is an economic refugee or a political refugee. However, we know from above that the law protects some political refugees but it does not protect economic refugees say; irrespective of the amount of hardship each individual is experiencing. As such, the law draws a morally arbitrary distinction based on category.⁵⁶

⁵⁶ If for some reason a difference in category mapped on to a difference in level then it would be a morally relevant distinguishing feature in so far as it did this. However, it is hard to see how this could be the case. There is no clear reason to think that dying of persecution is worse than dying of starvation.

Third, I argue that the law ought not differentiate based on location alone. This is a more complex issue and it warrants a more detailed analysis. First, I will explain why the law currently differentiates between refugees based on location. I argue that these reasons are based on an implicit assumption that there is a difference in the *level* of hardship experienced by asylum seekers and refugees seeking resettlement and that asylum seekers have a greater level of hardship than refugees seeking resettlement. I will then offer two reasons to call this assumption into question. I conclude this section by reiterating that the morally relevant feature is the level of hardship and arguing that location ought only be seen as a morally relevant differentiating feature in so far as it tracks a difference in level.

§3.1. Reasons the Law Currently Differentiates Between Refugees Based on Location

Justifications for the difference in the legal treatment of asylum seekers and refugees seeking resettlement seem to be based on an implicit assumption there is a difference in the *level* of hardship experienced by asylum seekers and refugees seeking resettlement. The assumption is that asylum seekers experience a greater level of hardship than refugees seeking resettlement. This assumption is based on generalisable material differences between their circumstances. One pertains to the difference in outcomes if a claim for refuge is denied. Another pertains to the process by which a second claim for refuge can be made from another destination country if the first is unsuccessful.⁵⁷

Other, more practical reasons are also offered for this difference in treatment. For example, Walzer (1983) suggests that one reason to legitimize the legal requirement to accept genuine asylum seekers but not necessarily refugees seeking resettlement is that “the numbers of asylum seekers are likely to be small under normal circumstances” (Carens, 1992:35). The number of refugees seeking resettlement is often much higher as it is often easier for people fleeing conflict or persecution to reach a bordering country with a camp, than it is for them to reach a destination country directly. This is because passage to a destination country is often incredibly expensive. Additionally, it often involves sea passage of some description which is incredibly dangerous.⁵⁷ As such, the number of asylum seekers are likely to be much lower than the number of refugees seeking resettlement. As such, due to feasibility concerns pertaining to space and resource restriction of destination countries, legally obligating countries to accept the smaller, but not the larger, group makes sense from a practical perspective.

The first difference between an asylum seeker and a refugee seeking resettlement is the outcome of a denied claim. If the asylum seeker is denied entry at the doorstep of the destination country, they are sent back to country of origin; that is, the site of hardship. If a refugee seeking resettlement is denied entry to the destination country, they are left where they are, in the third party refugee camp. Although this camp will likely involve its own kind of hardship, it is at least removed from what we can only hope is a worse kind of hardship at that original site. In this way, the asylum seeker is theoretically *prima facie* in greater danger than the refugee seeking resettlement at the point at which they are claiming refuge. The asylum seeker is at greater risk than the refugee seeking resettlement at the moment at which the claim is made and the obligations of states seem to map on to that difference in risk. In these ways, the asylum seeker is seen to encounter a greater level of hardship.

A second material difference between the situations facing the asylum seeker and the refugee seeking resettlement is the ease with which a second claim can be made. We know that if the destination country denies the asylum seeker entry, the asylum seeker is sent back to their country of origin. If they wish to claim refuge in another country, they need to manage to remove themselves from the site of hardship again and either get to a camp or another destination country. If a refugee seeking resettlement is refused entry to the country they are claiming refuge from, presumably they can make a claim against another country from within the camp. They are not evicted from their site of relative safety (the camp) to the original site of hardship (the country of origin) simply because they were refused entry to one country.⁵⁸ In this way, the asylum seeker is presumed to be faced with a greater level of hardship.

However, although concerns pertaining to practical feasibility often play a role in determining government policy in relation to issues, they ought not play a role in determining the moral outcome of this situation.

⁵⁸ One may wonder how this aspect of the law could possibly exist? Why would one kind of refugee be sent back to the site of hardship and another kind not if a state refused to admit them? It's not as bad as it seems. Countries who are party to the Convention agree to admit all asylum seekers who are shown to be genuine refugees. So the idea is that no genuine asylum seeker would be refused entry to a destination country. Where as many people who have been shown to be genuine refugees who are living in camps acting as a refugee seeking resettlement could be left in the camp indefinitely. So

§3.2 Two Ways to Undermine the Assumption

One way that people often try to undermine the assumption that asylum seekers experience a greater level of hardship than refugees seeking resettlement is to expose an instance in which asylum seekers are better off than refugees seeking resettlement. They argue that asylum seekers were likely far better off *in the country of origin* than refugees seeking resettlement. This is because asylum seekers typically have more extensive resources than refugees seeking resettlement in their country of origin. We can make this assumption because it is incredibly expensive to be an asylum seeker. People smugglers charge exorbitant amounts to take individuals/families from their country of origin to the shores of a destination country. Estimates of smuggling costs can be found at *Havocscope* (Havocscope, 2015). They range anywhere from 190 USD to be transported from Laos to Thailand to 277 000 USD to move from India to the UK. The reliability of this source is rather dubious. However, it can be used to give a rough estimate and show that asylum seekers would likely need to be comparatively well off in their country of origin to be able to pay anything like these prices. The refugees who can afford to be asylum seekers and travel to destination countries by plane or boat are usually those who are economically privileged in their country of origin. According to Carens, they are “more likely to be adult, male, well educated, and wealthy than the refugee population as a whole... it takes resources and knowledge...” (Carens, 2003:101). If the asylum seeker and refugee seeking resettlement in question are economic refugees then difference in resource access is the relevant distinguishing feature in terms of which refugee is facing their greatest level of hardship. If they are political refugees, facing the same level of persecution for instance, then their difference in terms of access to resources may, *ceteris paribus*, play some role in their ability to avoid their hardship. This will not necessarily be the case. However, *prima facie*, all other things being equal, access to more resources will often make asylum seekers better off than refugees seeking resettlement.

However, I believe that this counter-argument to the justifications for the difference in the legal treatment of asylum seekers and refugees seeking resettlement, as a result of

something that appears on face value to privilege refugees seeking resettlement actually once again privileges asylum seekers.

the assumption that asylum seekers experience a greater level of hardship than refugees seeking resettlement, is based on a misconception about which temporal slice is relevant when determining which type of refugee has a greater level of hardship. In other words, we can analyse whether asylum seekers and refugees seeking resettlement have a greater level of hardship at a number of different times. First we can ask: who has the greatest level of hardship at the time before movement has taken place. i.e. when they are still in the country of origin (as above)? Call this *Temporal Slice A*. We can also ask: who will have the greatest level of hardship after their claim has been denied by the destination country? ⁵⁹ Call this *Temporal Slice B*.

I believe that the most relevant time to be asking who has a greater level of hardship is *Temporal Slice B*. *Temporal Slice A* discussed in the first counter argument above, pertaining to the level of hardship previously experienced by the refugee when they were in the country of origin and whether that was mitigated by substantial wealth is largely irrelevant. What matters when one is seeking refuge is *Temporal Slice B* as this is the temporal slice that shows whether that danger is likely to continue. Refuge is not a compensation for past hardship. It is a way of avoiding future hardship. Refuge claims are future-oriented. The very idea of refuge is about seeking escape from a threat. When the threat is not there anymore, there is no need for refuge. As such, it seems clear that the relevant temporal slice is *Temporal Slice B*. As such, showing that refugees seeking resettlement have a greater level of hardship in *Temporal Slice A* does little to undermine the assumption that they have a lower level

⁵⁹ We can also ask: who has the greatest level of hardship during travel to the destination country/refugee camp; and who has the greatest level of hardship at the time when the claim is being made? However these temporal considerations yield minimal differences between asylum seekers and refugees seeking resettlement. In relation to the first question, the level of hardship is dependent on the hardship entailed in the travel to the destination country/refugee camp for asylum seekers and refugees seeking resettlement respectively. The level of hardship here is dependent on the mode of travel available to the refugee and the terrain that needs to be traversed. There is no clear difference between asylum seekers and refugees seeking resettlement in this case. In relation to the second question, this pertains to the difference in hardship between a detention centre in a destination country and a refugee camp in a third party country. It is unclear which would typically entail a greater level of hardship. As such, clear generalisations cannot be drawn in relation to either of these temporal considerations. As such, I have focused on the *Time A* and *Time B* outlined in the body of the text.

of hardship in Temporal Slice B, which is the time discussed in the original justification of the assumption in section 3.1. However, there is another way to undermine this assumption by focusing on *Temporal Slice B*, which I will explore now.

A better way to attack the assumption that asylum seekers experience a greater level of hardship than refugees seeking resettlement would be to show that it is only *typically* the case that asylum seekers are in a greater level of hardship than refugees seeking resettlement. This is not always the case. Sometimes conditions in camps are so bad, they are worse than some of the conditions that asylum seekers/ refugees seeking resettlement came from originally. For example, rape and sexual assault by locals and officials occur in refugee camps (Hirsch, 2012; UNICEF, 2003). For example, “Darfuri refugee women and girls face high levels of rape and other violence on a daily basis both inside and outside refugee camps in eastern Chad at the hands of family members, other refugees, and staff of humanitarian organizations” (Amnesty, 2009a). Furthermore, they often face sexual harassment by Sudanese teachers in schools within the camps (Amnesty, 2009b) and face harassment and rape when they leave the camps to collect water and/or firewood (Amnesty, 2009a). Another example can be seen in Dadaab and Pakhtunkhwa⁶⁰ in which the most common instances arise when women are forced to perform sexual favours in exchange for additional foodstuffs or when they are searching for firewood to sell so as to supplement their food rations (Hirsch, 2012; Firdous, 2011). These acts are analogous to, and just as problematic as, some instances of persecution that asylum seekers are fleeing in their country of origin.

All we need to call the moral relevance of the *location* distinction into question is for there to be some cases of comparable hardship in camps and the site of the original hardship in the countries of origin. If we can show that the location of an asylum seeker does not directly map on to a greater level of hardship in every case, then we can show that what the law ought to be focusing on is level itself, rather than location. From these examples, we can see that it is the case, at least sometimes, and refugees

⁶⁰ Pakhtunkhwa is a camp for internally displaced persons, rather than refugees.

seeking resettlement have a greater level of hardship at the time at which they make their claim than asylum seekers.

In some cases the hardship will be greater for the refugee seeking resettlement and in others it will be greater for the asylum seeker. It is true that in many, if not most, cases the asylum seeker will face a greater level of hardship in *Temporal Slice B*, which I argued was the most relevant time slice. However, it is unlikely that asylum seekers will face the greatest level of hardship in all cases in this temporal slice. The law ought to track level of hardship because, as we saw in Chapter 2, hardship is morally significant. As such, I believe that the fact that the disparity in level of hardship cannot be perfectly mapped on to whether the individual in question is an asylum seeker or refugee seeking resettlement means that the law ought to *prima facie* treat all genuine refugees equally first. The law ought to first consider the level of hardship each individual refugee is in, rather than first asking whether they are asylum seekers or refugees seeking resettlement. The law should require that countries let in those who have the greatest *level* of hardship. As such, the law should not differentiate based on level, except in so far as it tracks a difference in the level of hardship.

Conclusion

In this chapter I asked: who are states obligated to? I explored the different ways of carving up different types of refugees according to category, location and level. I argued that the law currently differentiates based on all three distinctions, resulting in differing obligations. The law only covers refugees of a specific sub category – political refugees who are fleeing significant persecution. It does not cover other categories. Furthermore, it privileges refugees who make their claim from the doorstep of a destination country (asylum seekers) over those who make their claim from a refugee camp (refugees seeking resettlement). Finally, the law implicitly differentiates based on level. It only counts those experiencing significant persecution as refugees. From here I made an argument about which of these distinguishing features are morally relevant and ought to influence state's obligations. I argue that level is the only directly morally relevant distinguishing feature. Category and location are only relevant in so far as they reflect a difference in level. I conclude therefore that a difference in level is the only feature that ought to lead to a difference

in obligations. Having established which types of refugees states are obligated to as those of the appropriate level of hardship, in the following chapter I will explore what *kinds* of obligations states have to refugees.

Chapter 5: Kinds of Obligations

In this chapter I will continue to explore states' moral obligations to refugees. In the last chapter I concluded that if there is any distinction to be drawn between different types of refugees in relation to states' moral obligations then that distinction pertains only to refugees' level of hardship.

I will now go on to discuss states' obligation to give refuge to refugees in virtue of refugees' hardship. I will explore what states are morally obligated to do and what they are legally obligated to do in relation to the duty to giving refuge. I will consider what *kind* of obligation this duty is in each instance.

I will begin with states' *moral* obligation to give refuge to refugees. Some believe states' moral obligations to give refuge are not in fact obligations at all. There are merely supererogatory; it would be commendable if we did help refugees but it would not be wrong of us if we did not. Others believe we do have obligations and that these obligations are imperfect duties. Others still believe we have perfect duties to refugees. I will argue that states' moral obligation to give refuge is a perfect duty that is claimable against states collectively.

I will then consider what kind of obligation states' *legal* obligation to give refuge to refugees is. I will argue that the legal obligation takes on different kinds in relations to different types of refugees. States have a perfect duty to give refuge to asylum seekers in accordance with the principle of non-refoulement. I argue that they have an imperfect duty with respect to refugees seeking resettlement and that they have no duty at all to internally displaced persons or individuals who have not moved from their site of hardship.

I will conclude that there is a large gap between the kinds of moral obligations states have and the kinds of obligations that are currently required of under the law.

§1. Supererogatory

There are several ways that one may try to explain our obligations to refugees. They vary in strength of obligation. I will start with the most limited view and increase in strength. First off, some may think that states' 'duty' to give refuge is supererogatory. That is, there are no obligations involved. It would be virtuous of states to offer refuge but they are not obligated to do so. This is an important viewpoint to consider, as many politicians often adopt this view.

Loosely speaking, another way to cash this view out is to argue that the 'duty' to give refuge is a requirement of *charity* rather than a duty of *justice*. This distinction between charity and justice can be cashed out in a number of ways. For simplicity's sake, requirements of justice are thought of in terms of obligations, owed to specific others, with correlative rights. Requirements of charity are thought of as requirements only in a very loose sense: the demands of charity boil down to being optional. Charitable action is in essence supererogatory in that it is a mark of virtue, of going "above and beyond" our obligations, but it is not morally required.

On a global scale, the general idea behind the supererogatory 'requirement' view is that we only have duties of justice, and thereby actual obligations, to members of our own society. 'Duties' of charity are what remain for non-members. As such, our duty to give refuge to refugees (who are by definition non-members) is not in fact an obligation, but a supererogatory 'requirement'.

There are many reasons to disagree with the idea that the duties to refugees are supererogatory. First, one could criticise the idea that duties of justice, and thereby the idea that obligations are confined to members of a state. One way to do this is to highlight that no philosophers I know of actually make the argument that we do not have obligations of justice to non-members. The closest arguments to this come in the form of the claim that we have *special* obligations to members. These special obligations are thought to stem from: similarities of culture/religion or from shared experiences (Kleingeld and Brown, 2014) or from the necessity of psychological ties

of nationhood (Kleingeld and Brown, 2014)⁶¹ or obligations of reciprocity (Miller, 1995) or co-dependence on stated institutions (Rawls, 1999). A detailed exploration of these arguments is beyond the scope of this paper because all that each of these arguments shows (if they are accepted – which I would argue is a rather dubious move) is that states have special obligations to their members. These arguments do not make the next step and argue that states do not also have other even secondary obligations to non-members. As these are the closest arguments I can find to the supererogatory position, and they do not go far enough, it is difficult to find a philosophical backing for this view that duties of justice and thereby obligations are confined solely to members.

Second, even if one does not accept that we generally have duties of justice to non-members for whatever reason, one would likely still accept that we have something stronger than supererogatory responsibilities to refugees. One reason to think this is because refugees are in significant hardship. We showed that hardship is morally significant in Chapter 2. Even if we do believe that we have privileged obligations to state members, when we compare upholding those obligations to the moral significance of the plight of refugees, unless members of our own country are in equivalent levels of hardship, it is difficult to see how our duty to give refugee could be seen as merely supererogatory.

Even Nagel, who a key representative of the position that duties of justice are only owed to the fellow members of one's community, leaves room for strong duties to non-members that contain correlative rights in specific cases of extreme need. He calls these duties to non-members in extreme need "humanitarian duties". Nagel posits "international requirements of justice [suggest that we must uphold] the most basic human rights" (Nagel, 2005:1). He argues that we are to employ "the most basic humanitarian duties of rescue from immediate danger" (Nagel, 2005:9) and that we must protect "fellow human beings threatened with starvation or severe malnutrition" (Nagel, 2005:3). These humanitarian duties of justice are owed to everyone in the world" (Nagel, 2005:5). Duties to refugees would likely fall into Nagel's notion of

⁶¹ Kleingeld and Brown, 2014 outline this argument, though it is not clear that they support it. (Kleingeld and Brown, 2014

humanitarian duties as refugees often have their human rights threatened, need rescuing from “immediate danger” and economic refugees are often “threatened with starvation or severe malnutrition” (Nagel, 2005”: 1, 3, 5). Nagel’s humanitarian duties are not supererogatory, and, like duties of justice, they correlate to rights. This means that Nagel would likely suggest that states’ obligations to refugees (which I have shown fall neatly into his notion of humanitarian duties) correlate to rights. This means that Nagel would think that states’ obligations to refugees are not merely supererogatory non-binding duties. As such, even philosophers with nationalistic tendencies (who are the philosophers who are most likely to believe that duties to non-members are of the weaker variety, or are in fact not duties at all) would think that our duties to refugees are stronger than the supererogatory view suggests. As such, even though politicians adopt this supererogatory view on a regular basis, it lacks serious philosophical grounding.

In summary, I believe the notion that our duties to refugees are merely supererogatory is unconvincing. As such, I will explore another option for an explanation of the kind of obligations we have to refugees – the idea of imperfect duty.

§2. Imperfect Duties

So, if we do have obligations, what kind of obligations are they? Modern Kantians have raised some interesting distinctions that will be helpful for this discussion (Hope, 2013). They have raised the idea of the distinction between imperfect duties and perfect duties in relation to our obligations to others. An exploration of the definitions of each of these kinds of duties will occur in the sections below.

The crux of the matter is that some may argue that our obligations to refugees are imperfect duties, while others may argue that they are perfect duties. In this subsection I will explore the various notions of imperfect duties. There are two conceptions of imperfect duty that the duty to give refuge could fall under: Modern liberal interpretation of imperfect duties and Kantian imperfect duties.

§2.1. Modern Liberal Imperfect Duties

First, I will explain the *Modern Liberal* Interpretation of imperfect duties. There are two key aspects of the modern liberal view that are relevant for our purposes. First

they have vague content (Hope, 2013:9). That is, having an imperfect duty to x means that we should x, but “how often and how much we should” x is underdetermined (Hope, 2013:2-3, 8). Meaning “as long as we sometimes” do x, we “do no wrong when we do not” x (Hope, 2013:3). In this sense, there is a matter of discretion as to whether each instance of the duty is upheld (2,8). The duty as a whole can be upheld and yet the duty-bearer can essentially choose whether they will enact it in each instance. Second, imperfect duties are “less weighty” in terms of moral import than an alternative kind of duty called a perfect duty (which will be explained in the following section) (Hope, 2013:3).

This modern liberal imperfect duty seems to be almost as weak as the supererogatory duty outlined above.⁶² It does not seem appropriate for the duty to give refuge. This is because the obligation attached to it is incredibly weak. You only need to fulfill the obligation and offer refuge when you want to, provided that you do it sometimes.⁶³ This is inappropriate for the duty to give refuge as refugees are experiencing significant hardship, which we showed is morally relevant in Chapter 2. States should at least be obligated to help in all instances in which they feasibly can – simply discharging their obligation when they want to seems insufficient in the case of refugees. As such, I do not think that the duty to give refuge is a modern liberal imperfect duty.

§2.2. Modern Kantian Imperfect Duties

However, there is another interpretation of the notion of an imperfect duty; the *Modern Kantian* interpretation of imperfect duty. Hope explores this notion in his 2013 paper (Hope, 2013). Like the modern liberal version of imperfect duty, these duties are not required to be discharged in all circumstances. However, unlike the modern liberal version, this view of imperfect duty is incredibly strict and demanding.

⁶² However, it is not quite as weak. In the case of the modern liberal imperfect duty they are still obligations. If you never fulfilled the duty you would be a bad person. Whereas in the case of the supererogatory duty you would be a good person if you did discharge the duty, but if you never did, you would not be a bad person.

⁶³ If the obligation to give refuge were a modern liberal imperfect duty then some refugees would be admitted and others may not as states are only obligated to give refuge when they want to, provided they do it at least once.

First I will explain why these duties are not required to be discharged in all circumstances. According to O'Neill, imperfect duties "will be enactable by all but not for all" (O'Neill, 1996: 148). This means that its possible to enact these duties "fully to one or more agents, but not to all within the domain the duty prescribes us to act towards" (Hope, 2013:8). What this means is that the duty can be enacted in its full extent with respect to one or more refugees but it cannot be enacted to everyone that the duty applies to – i.e. all refugees. Here, Kantian imperfect duties recognise the limitations of duty-bearers. Some duties are simply impossible for the duty-bearer to discharge to all people who they apply to. In these instances the duty bearer has to select who they will discharge the duty to (Hope, 2013:8). Such duties are imperfect because they cannot be discharged in all circumstances for all people who they applies to.

Despite this, imperfect duties are very *strict* duties in that you must discharge them in all of the circumstances in which it is possible for you to do so. These circumstances include all situations in which discharging the imperfect duty does not come into conflict with discharging a perfect duty. Exactly what a perfect duty is will be explained in detail in the follow section. For now suffice it to say that a perfect duty is a duty that needs to be discharged in all circumstances. Hope spells this idea out with an example. He discusses the example of the duty to care for those in need. He states: "Whenever someone is in need, and whenever I can assist (I am able to, and doing so will not conflict with perfect duty), the imperfect duty of care requires that I do assist" (Hope, 2013:8). In this way, Kantian imperfect duties are incredibly demanding. The demandingness is only limited by the fact that we are not super-human and cannot possibly help everyone. If we could, we would be required to do it.

§2.2.1 Modern Kantian Imperfect Duty and the Refugee Case

Now let's consider the obligation in question. The Kantian would think that the obligation to give refuge is a Kantian imperfect duty because it seems to fulfill the two criteria for Kantian imperfect duty outlined above. First, it is arguable that a state may not be able to enact its duty to offer refuge to all refugees who seek refuge from the state in question. It is perhaps possible that a state is simply incapable of giving refuge to all refugees who seek refuge from them in the world. If this is case, the duty

could not be discharged to all the refugees seeking assistance. Some selection process would need to be adopted. A Kantian would see this as an imperfect duty, because imperfect duties cannot be discharged to everyone that they apply to. The duty-bearer has to select who they will discharge them to. Whether or not it is possible for each state to discharge this obligation is an empirical question – the answer to which is beyond the scope of this philosophy paper. However, if it isn't feasible that states could admit all refugees who apply, then this duty is looking an awful lot like a Kantian imperfect duty thus far.

Second, the Kantian imperfect duty also more accurately explains the strictness of the duty to give refuge than the modern liberal account. It seems clear from the presence of significant hardship in refugee cases (as explored in Chapter 2) that we are obliged to offer refuge to all refugees who apply for refuge, or at least offer refuge whenever possible, in virtue of the moral significance of that hardship. As such, this modern Kantian imperfect duty sounds much more appropriate for the duty to give refuge than the modern liberal account or worse still, the supererogatory account.

§2.2.2 Problems with Kantian Imperfect Duty

However, I believe that something is still missing with this account. Imperfect duties of all kinds (modern liberal/Kantian) are not attached to rights. One may wonder why this would be a problem. I will now offer three reasons to think that it might be problematic to posit that a right is not attached to states' obligation to offer refuge to refugees.

First, if a right is attached to a duty, then it must be fulfilled in all cases, for all people who have that right. A consequence of not having a right attached to a duty (as in the case of a Kantian imperfect duty) is that the duty may be discharged in relation to some individuals and not others. The problem with this can perhaps be best seen through an example. Imagine that a state offers refuge to one refugee (call her Sally) and does not offer it to another (call him Steve). The reason that the state does not offer refuge to Steve is because it has reached immigration capacity.

An important question to ask at this point is: Has Steve been wronged? If the answer is no, then one would reasonably think that there was no right attached to the

obligation to give refuge. If we think that the answer is yes, then this is likely because we think that there is a right attached to the duty to give refuge. Each refugee has this right. As such, even though Sally was offered refuge, Steve has still been wronged because he also had a right that refuge be offered to him.

If we think the answer is no, Steve was not wronged, then we may think that the duty to give refuge is a Kantian imperfect duty. If that were the case, then a state could legitimately offer refuge to one individual and not another simply because the duty-bearer has reached capacity for discharge. If the duty to give refuge were an imperfect duty, then the state would not wrong Steve because he had no right to refuge to begin with. The state simply had a Kantian imperfect duty to offer refuge in all instances in which it could before doing so conflicted with a perfect duty. If this is a Kantian imperfect duty, then as long as the state assists as many refugees as they can, the state has not wronged those it did not assist (Steve). The duty-bearer is not violating the duty by helping one person over another.

However, I believe that we have reason to think that the answer is yes and that Steve has been wronged in some way by the state failing to offer him refuge. The reason I believe this is because of the moral significance of the severe hardship he is in. Support for this idea draws on Chapters 2 and 3. In Chapter 2 I showed that we have reason to believe that hardship is morally significant using a Wigginsian argument. Then in Chapter 3 I highlighted that refugees' hardship is severe. As a result of the morally significant hardship that Steve is in, I think that we have reason to believe that the state has wronged Steve in not offering him refuge.

A modern Kantian would likely be unsatisfied with this response as they would assert that Steve is not wronged because, in helping as many refugees as it could, the state is doing exactly what is required of it. One way to respond to this is to show that Steve has been wronged because he has a claim against the state that is going unmet.

The presence of this claim can be shown by appropriating Tasioulas' argument about extreme poverty. Tasioulas argues, in four steps, from the existence of significant human interests to the existence of human rights. To do so, he first makes a leap from the presence of significant *interests* to a *duty* to uphold those interests. From there he

suggests that there is a claim correlated to the duty, and thereby a right which defends human interest (Tasioulas, 2007:78). Tasioulas' argument is helpful one here, in that he shows that everyone, including Steve, has an interest which must be met and it is not being met. By Tasioulas' argument, Steve has been wronged because he has a claim against the state to have certain needs met and that claim is not being upheld.

Tasioulas suggests that humans have *interests* in avoiding "a significant level of material deprivation" that threatens "a number of their interests: health, physical security, autonomy, understanding, friendship, etc" (Tasioulas, 2007:78). A significant threat to these interests justifies: "the *impositions of duties* on others" to protect these interests (Tasioulas, 2007:78). "The duties... represent practicable *claims* on others" (Tasioulas, 2007:78). Therefore,... Each individual ...has a right to be free from severe poverty" (Tasioulas, 2007:78). Here he implies that severe poverty is defined by a significant level of material deprivation (Tasioulas, 2007:78). Essentially, Tasioulas argues that some serious and significant interests are connected to rights.

This argument about poverty can be applied to the hardship of refugees, because many of the interests listed are the same ones that are under threat for refugees. For example, both poverty and being a refugee cause "a significant level of material deprivation" which threatens "a number of their interests: health, physical security, autonomy, understanding, friendship, etc" (Tasioulas, 2007:78).

As such, Tasioulas gives us reason to believe that certain interests exist, which must be met and that these are the kinds of interests, which are not being met in refugee cases. Thus, the fact that Steve has interests that ought to be met, but that are not being met when states fail to offer him refuge supports the idea that he is being wronged.

If it is the case that Steve has been wronged, then this means that a right is attached to the obligation to give refuge. This means that the state morally has to admit *all* refugees seeking refuge, including Steve. If the state fails to do this due to feasibility concerns, then it has simply failed in its duty to Steve. This reading of the situation

seems more appropriate given the significant hardship associated with refugees' circumstances.

The upshot of this discussion of Steve is that there is a key problem associated with the view that the duty to give refuge does not have a right attached. That is, if no right is attached, then it can legitimately be discharged to some refugees and not others, while still upholding the duty. We have shown, using the example of Steve, that there is something wrong with this reading of the obligation to give refuge – as it seems that Steve himself has been wronged when the state does not offer him refuge. As such, Steve's situation has shown us that we have reason to think there is a right attached to this obligation and that it would be problematic if the obligation to give refuge were not one that recognized this right and ensured that all refugees, including Steve, were offered refuge.

A second problematic consequence of not having a right attached to the duty is that refugees cannot *claim* refuge from states. One can only claim something one has a right to. Steve would not be able to claim refuge from the state (nor would Sally for that matter). Why is not having a claim so problematic? If one cannot claim refuge from the duty-bearer it then there is no assurance that they will have the duty discharged. Again many refugees may be left without refuge. Again, from the discussion of hardship in Chapter 2, I believe that this is morally unacceptable given the significant hardship that refugees would be left in (starvation, torture, death to name a few). As a result of the hardship I believe that obligation to give refuge needs to be attached to a right and thereby claimable.

Third, another problematic consequence that comes out of the duty not having a right attached is that it is not as easily institutionalisable in the law. Obligations that are connected to laws are more easily enforceable. If the duty-bearer does not fulfil their duty, then law enforcement can make them uphold their duty. The individual can legally claim their right from the duty-bearer. If their right is not upheld, they can take the duty-bearer to court. In the refugee example, if refugees have a right to refuge that is entrenched in international law (and hopefully ratified in domestic legal systems) then they can claim it from a signatory state. Signatory states that fail to provide this refuge can in theory be held accountable for not doing so. This legal accountability

will arguably make states more likely to fulfill their obligation in the first instance and if it does not, at least there will be an option for legal recourse on the part of the refugee. As such, failing to have a right attached to the duty to give refuge would make it less enforceable in a legal sense.

Different interested parties would have different views on whether this legal enforceability of the obligation to give refuge, as a result of refugees having a right, is something we should accept. Signatory states may be wary of this legal enforceability as it would mean that they could encounter legal proceedings or some reprimand from other states if they failed to uphold their obligation in a specific instance. If the duty were a Kantian imperfect duty, without a right attached, they would not be held accountable if they failed to let a specific refugee in, provided they were letting in as many refugees as they feasibly could. Furthermore, making this obligation legally binding would mean that states could not avoid offering refuge if other state obligations became more pressing. For example, imagine national security needed to be intensified in the instance of a war and states decided they wanted to close their borders somewhat and reduce the number of migrants and refugees being admitted. If the duty were attached to a right, then states would not be able to make this policy decision without opening themselves up to potential legal action as they would be failing to uphold refugees' rights to refuge. Making this obligation legally binding would make states vulnerable to legal action if they do not uphold it. This effectively interferes with states' sovereignty over their immigration policy, even in times of war (unless a proviso for that kind of situation is written into the law) – something that states are often reticent about doing.

However, there are reasons to think that state sovereignty ought to be interfered with in this case and that we would want the obligation to be legally binding and attached to a right. First, again, an argument can be made from Chapter 2 suggesting that their hardship is significant and severe enough (from Chapter 3) such that we would think that states' obligations to refugees ought to be legally enforceable, even if they do conflict with issues of state sovereignty (as we discussed in Chapter 1). The idea that we would want the obligation to give refuge to be legally enforceable, gives us reason to think that there is a right attached to this obligation.

Furthermore, the law already impedes on state sovereignty in relation to refugees. Signatory states have already agreed to give up their sovereignty in relation to the obligation to give refuge. The obligation to give refuge, at least to asylum seekers, is already attached to a right. If an asylum seeker reaches their destination country and they can show that they are a genuine refugee, then the state must give them refuge under the principle of non-refoulement. In Chapters 1,3 and 4 I have shown that all refugees fleeing similar significant levels of hardship ought to be treated equally and offered refuge. As I argued in Chapter 4, refugees seeking resettlement are no different to asylum seekers in any morally significant way. The only morally relevant distinction between different refugees is the level of hardship they endure/are likely to endure. As such, all refugees ought to be covered by the same protection. I posit that all refugees should be given refuge if there is an obligation to give refugees refuge. As such, if asylum seeker have a legal right to refuge, it seems clear that we should think that refugees in general should have a legal right attached to the obligation of states to give them refuge.

In summary, we have several reasons to think that the obligation to give refuge has a right attached. First, if a right is attached to a duty, then it must be fulfilled in all cases, for all people who have that right. If a right is attached, then all refugees have a right to receive refuge. There is a recognition that Steve would be wronged by not being offered refuge. Second, if a right is attached to a duty, then that duty is claimable from the duty-bearer. Finally, if a legal right is attached to a duty then it is enforceable. As such, if we are correct in thinking that there is a right attached to the duty to give refuge, then there is something significant lacking in a Kantian imperfect duty explanation of this duty. As such, we have reason to think that the duty to give refuge is perhaps a different kind of duty.

§3. Perfect Duties

If we think the obligation is one that has rights attached and is thereby claimable and, if attached to a legal right, is enforceable, we need the obligation to be a perfect duty. What is a perfect duty and how is it distinct from an imperfect one? First, perfect duties are owed to everyone and are owed in all circumstances. Second, they can be claimed by the refugee against a destination state. Recognizing that this obligation is a perfect duty rather than a Kantian imperfect duty would mean that the duty would be

attached to a right and thereby claimable by the refugee and enforceable if a state failed to fulfill their duty to offer refuge.

§4. Questioning the Perfect Duty Choice

A Kantian might respond to the idea that this duty is a perfect duty by flagging that it is perhaps unlikely that each state will be able to offer refuge to all refugees in all cases. Admitting refugees requires: space, funds, infrastructure etc. It is possible that some states will lack the resources necessary to admit all refugees who claim refuge from them. As such, there will be cases where refugees theoretically have a right to refuge and no one who is able to discharge this duty. Here the Kantian may ask: what is the value of a right if it cannot be upheld? Perhaps the duty to give refuge is not in fact attached to a right.

§4.1. Response 1: Reject Kantian assumption

There are two ways to respond to this worry and continue to argue that the refugee has a right and the obligation under consideration is a perfect duty. First, one could reject the Kantian assumption that for a right to exist, it must be attached to a duty that can be fulfilled in all situations in which it applies. That is, one could argue that it is possible for refugees to have a right, even if a state's correlative obligation to give refuge is one that cannot be enacted for all refugees claiming refuge from that state. In this instance, it is simply a right that is not fulfilled; a duty that has failed to be upheld. This seems reasonable. Most, if not all, human rights are not upheld on various occasions. Humans are not the kind of creatures who always keep to their moral code and always fulfil their duties. We are fallible and our circumstances are not always compatible with fulfilling our moral duties. However, if we have a duty to do x (in all instances), then our fallibility and the incompatibility of our circumstances does not mean that our duty does not hold in all circumstances. It simply means that we have failed to fulfil our duty.

In response to this one may argue that a right that we systemically fail to fulfil in does not have much value. There does not seem to be much practical value in having a right if it cannot be claimed from a duty-bearer who is in a position to uphold it. What is the point of having a right that you cannot ensure is fulfilled? Many would argue that such a right is pointless if we cannot defend it (O'Neill, 2000:97).

There are two reasons why I believe that this kind of right still has value that is worth preserving. First, even if the right does not have practical value at present, it still has symbolic value. People still recognise that you ought to have your claim fulfilled. However, duty-bearers simply do not have the capacity to ensure that your claim is fulfilled at present. If your claim remains attached to a right, then if circumstances change, and the duty-bearer once again has the capacity to fulfil your claim, they will still be obligated to do so.

A second reason to think that rights are still valuable, even when they are often unable to be fulfilled, is to see that they offer a goal for the duty-bearer to aspire to. Duty bearers are obliged to fulfil their rights. As we have just seen, that obligation does not go away simply because feasibility constraints get in the way. As such, having a right attached to the obligation acts as a firm reminder and goal for future fulfilment.

§4.2. Response 2: Collective Claiming

A completely different way to respond to this criticism that there is no value in a right (and thereby a perfect duty) if it cannot be upheld and states would fail to uphold this duty, is that one could argue that states could collectively uphold the duty. That is, one could argue that this duty is in fact a perfect duty, which is claimable against all states collectively. The idea is that if one state cannot fulfil the obligation in all circumstances, perhaps all states could fulfil the obligation collectively. So the right to refuge could be claimed from all states collectively.

This idea of collective claiming is considered by Elizabeth Ashford. She uses the example of the obligation to alleviate poverty (Ashford, 2007:216-217). Ashford posits that all individuals are responsible for ensuring that we do not live in a world that deprives people of “access to basic necessities” (Ashford, 2007:216). This is a “shared duty” (Ashford, 2007:216). “[t]he right-holders’ claim is a claim against every [individual] agent who is not doing enough to implement their share of the shared duty” (Ashford, 2007:217). In the same way as Ashford believes that all individuals are duty-bearers in relation to the right to access basic necessities, it could be suggested that all states are duty-bearers in relation to the right of refugees to be given refuge. The reason I argue that states, rather than individuals hold these

obligations, is that individuals cannot admit non-citizens into a state to offer them refuge.

So how would this duty to give refuge look if it were collectively claimable? The argument for collective claiming is a little difficult to make in this instance as the duty to give refuge seems to be the kind of duty that only requires one duty holder to discharge it. That is, only one state can offer a refugee refuge at a time and unless something goes seriously wrong, only one state should need to. This is not the kind of duty that is susceptible to being discharged as a group. However, it is possible that some global data-base could be created in which all refugee claims are entered and the states all offer a specific percentage of the refugees refuge. That way, if one country could not support all the refugees that currently make claims against that state for refuge, then some other state with more resources could support them, upholding the obligation collectively. As such, one could argue that the right to be given refuge can be claimed by refugees against states collectively. Fulfilling this obligation could then be divided up between the states based on capacity.

§4.3. Do We Need Either Response?

However, we only need to worry about taking either of these routes (i.e. either denying the Kantian assumption or adopting the notion of collective claiming) if each state could not feasibly offer refuge to all refugees who claim refuge from that state. It is at least conceivable that each state could feasibly offer refuge in every case in which a claim is made against the state. If this is the case, then the duty to give refuge is still a perfect one as it could be claimed by refugees and fulfilled in all circumstances. However, just because it is conceivable, this does not mean that each state can actually offer refuge to every refugee who claims refuge from them.

What would happen if the number of refugees making claims exceeded a specific state's capacity? One may think that this would mean that the duty to give refuge is an imperfect one. It would be the kind of duty that states had, but refugees did not have a right to it, it could not be claimed and states had to discharge it whenever they could, but if they could not discharge the duty then they would not have failed in their duty. The specific refugee that they could not offer refuge to would not have been wronged in any way. However, I still have the qualms about this view that I raised above. It

seems that refugees do have a right and a claim against states, even if it cannot be fulfilled in every instance by the state that the refugee first makes their claim to.

As such, I suggest that the collective claiming move above is the best way to explain the kind of duty that the duty to give refuge is. That is, the duty to give refuge is still a *perfect duty*, held by *all* states. The reasons that I think this is still a perfect duty even if we need to consider it a case of collective claiming I believe that the duty is something that *all* refugees ought to have an *enforceable right* to and be able to *claim*. Having outlined what I believe states' obligation to offer refuge to refugees morally ought to be I will now compare this to the kinds of obligations to give refuge offered by our current legal definition.

§5. What Kinds of Obligations do States have Under the Current Law?

Our current legal definition implies that we have a perfect duty to give refuge to asylum seekers but we do not have a perfect duty to give refuge to refugees seeking resettlement.

§5.1. Asylum seekers

First I will discuss how states' obligations to asylum seekers are perfect duties. This idea was touched upon the previous section. I will now go into more detail. The *Convention Relating to the Status of Refugees* (1951) prohibits refoulement (returning the refugee to the country of origin)⁶⁴ of genuine refugees. Refusing to give refuge to an asylum seeker would constitute refoulement as refusing entry to an asylum seeker results in them being sent back to their country of origin. As such, genuine refugees who take the asylum seeker route have a right not to be sent back to their country of origin.

This right means that states' duty to them is a perfect one. First, it must be discharged to all individuals to which it applies; that is all asylum seeker who seek refuge from their doorstep). It entails a claim as asylum seeker claim refuge from the state. It

⁶⁴ Technically speaking, the principle of non-refoulement also prohibits returning the refugee to any other country in which the individual may be likely to encounter persecution (High Commissioner on Human Rights, 1977).

corresponds to a right. The asylum seeker has a right that the state admits them, provided they can show that they are genuine asylum seeker.

§5.2. Refugees Seeking Resettlement

However, there are several reasons to think that the duty to give refuge to refugees seeking resettlement is not a perfect duty. First, unlike asylum seeker, refugees seeking resettlement do not have a right under the convention to be admitted to a destination country as a result of the principle of non-refoulement. This is because if a destination country refuses to give refuge to a refugee seeking resettlement, this does not entail refoulement. If the destination country refuses to offer a refugee seeking resettlement refuge, the refugee seeking resettlement will be left in a refugee camp. They will not be sent back to their country of origin (i.e. experience refoulement). As such, the refugee seeking resettlement does not have a right to be admitted to the destination country. They only have a right to stay in the camp.⁶⁵ As such, there is no right for the refugee seeking resettlement attached to the destination country's duty to offer them refuge. This gives us one reason to think that destination states' duties to refugees seeking resettlement are not perfect duties under the current state of the law.

Another reason to think that a destination state's duty to refugees seeking resettlement is not perfect is that it need not be discharged in all instances to all who the duty applies to. That is, states are not legally obligated to admit all refugees seeking resettlement who are applying to them for refuge from camps. Currently, under the law, they can choose who/how many they admit. Again, the duty to give refuge is shown to not be a perfect one for refugees seeking resettlement.

⁶⁵ Refusing them entry to the camp would perhaps constitute refoulement if they had no alternative but to return to their country of origin. As such, they do have a right to refuge in the camp until a state accepts them (however this right on the part of the refugee seeking resettlement is not a right as a refugee seeking resettlement, rather it is a right as an asylum seeker. They are seeking temporary asylum from an intermediary country to live in a camp while they make an application and await a verdict from a destination country. Their right to temporary refuge in the camp comes as an asylum seeker. Unlike an actual asylum seeker, they do not have a right to refuge claimable against a destination state.

It looks more like an imperfect duty. However, it is difficult to determine what type of imperfect duty towards refugees seeking resettlement is embodied in the convention. In order to work this out we could consider the overall aim of the convention. There is no specific article requiring an absolute or population/resource relative number of refugees seeking resettlement that need to be admitted by states. However, the overall aim of the convention is to protect refugees (both refugees seeking resettlement and asylum seekers) and offer them refuge. It seems that signatory states are thereby implicitly expected to uphold the intention of the convention and admit refugees seeking resettlement where they can.

It is unclear whether the convention implies that states are obligated to let in refugees in every instance that they can feasibly admit them (implying a Kantian imperfect duty), or whether they can choose how many/ which ones to admit when it comes to refugees seeking resettlement (implying a modern liberal imperfect duty). The intention of the convention to protect refugees seems to me to imply a Kantian imperfect duty. It appears to be stronger than the kind of obligation accounted for in the modern liberal view. It seems that if a state signs the convention, it is recognizing the significance of the plight of refugees and agreeing to help them 'when possible', rather than 'when desired'. This seems to me to be implied in the law. However, I do not believe that my interpretation of states' duty to give refuge to refugees seeking resettlement as a Kantian, rather than modern liberal, imperfect duty is in any way conclusive.

Furthermore, even though I believe that the law dictates a Kantian imperfect duty, this is certainly not the interpretation adopted by many current politicians in their immigration policies. Many modern politicians seem to see their obligations towards refugees seeking resettlement, and even in some cases asylum seeker, to be modern liberal imperfect duties or even supererogatory as I highlighted at the beginning of this chapter.

§5.3 Internally Displaced Persons and Those Who have Not Moved

Furthermore, states do not have obligations to internally displaced persons or individuals who have moved from the site of hardship. As explained in Chapter 1, these individuals do not fall under the legal definition of the term 'refugee' and they

remain under the jurisdiction of the country of origin as they are within its borders. As such, states are not obligated to offer them refuge.

§5.4 Summary

In summary, current legal obligations proscribe that states have a perfect duty to give refuge to asylum seekers. Furthermore, current legal obligations arguably proscribe a Kantian imperfect duty to give refuge to refugees seeking resettlement. Finally, the legal system suggests that states have no duty to give refuge to internally displaced persons, or those who have not moved from the site of hardship as these individuals are still under the jurisdiction of the country of origin.

Conclusion

In summation, in this chapter I have explored states' obligations to give refuge to refugees. I have explored what states are morally obligated to do and what they are legally obligated to do in relation to giving refuge. I argued that states' moral obligation to give refuge is a perfect duty because it is attached to a right, is claimable and enforceable. I argued that this perfect duty can be claimed against states collectively. In coming to this conclusion I showed why I believe that the supererogatory, modern liberal imperfect duty and modern Kantian imperfect duty accounts do not adequately explain the moral obligation of states to give refuge to refugees.

I then analysed the legal obligation to give refuge to refugees under the current state of the law. I argued that the current legal obligation to give refuge takes on different forms in relation to different types of refugees. It is a perfect duty with respect to asylum seekers, an imperfect duty at best with respect to refugees seeking resettlement and states do not have a legal duty at all to internally displaced persons or to individuals who have not moved from their original site of hardship.

As such, there is a significant gap between the kinds of moral obligations states have and the kinds of obligations that are currently required of under the law. Under the law, states only have a perfect duty to offer refuge to asylum seekers. However, in terms of morality states have a perfect duty to offer refuge to all refugees irrespective of their location or category. We have reason to believe that *all* refugees have a right

and a claim to refuge that can be claimed from states collectively in virtue of their hardship. In Chapter 3 I offered a way forward in which the law is modified to reflect this recognition.

Conclusion

§1. Summary

In summation, I have argued that hardship is the core of a moral conception of the definition of a ‘refugee’ and also states’ obligations to refugees. The current legal definition and obligations overlook this central notion. In Chapter 1 I showed that the current legal definition draws morally arbitrary distinctions between different types of refugees. I showed that a central feature, which can be found in all refugee cases, is the presence of hardship. Thus I began to motivate a case for accepting the moral significance of hardship.

In Chapter 2 I used Wiggins’ 1987 paper to offer an argument for the moral significance of hardship. I showed that hardship’s significance could be seen on either a consequentialist or a deontological approach. I favoured the deontological approach as it was able to uphold the notion of rights and human dignity, which are pivotal in relation to refugee concerns.

In Chapter 3, having established the moral significance of hardship and its relevance to the law, I offered a modification to the legal definition of the term ‘refugee’ that was hardship focused. Then, in Chapters 4 and 5 I explored the obligations that flow from this hardship-focused definition.

In Chapter 4 I asked to whom states are obligated. In answering this, I found that the law currently distinguishes between refugees based on: category, location and level. I argued that the only morally relevant distinguishing factor is the level of hardship experienced or likely to be experienced by the refugee. As such, I suggested that states are obligated to refugees who experienced a significant level of hardship.

Finally, in Chapter 5 I asked what *kinds* of obligations states have to refugees. I suggested that, in a moral sense, states have a perfect duty to give refuge to refugees and that this duty is claimable against states collectively by each refugee. However, I also suggested that states currently only have a perfect legal duty to give refuge to some refugees and not others. That is, states have a perfect legal duty to asylum

seekers but they have a Kantian imperfect duty to refugees seeking resettlement and no duty at all to individuals who have not been able to leave their site of hardship. As such, I highlighted that there is a difference between states' obligations -- moral and legal -- to asylum seekers, refugees seeking resettlement and individuals who have not managed to move.

I concluded by reiterating that we have reason to believe that *all* refugees have a right to refuge that can be claimed from states collectively in virtue of their hardship and restating that in Chapter 3 I offered a way forward in which the law is modified to reflect this recognition.

§2. Areas for Further Research

An interesting area for further research would take into consideration what other obligations states have to refugees. In this dissertation I focused on one way that states can ensure that refugees do not remain in significant hardship. I considered states' obligation to give refuge to refugees. This physically removes the refugee from the site of hardship, thus reducing their hardship. I argued that states have this obligation to give refuge to refugees in virtue of refugees' hardship.

However, there are a number of ways we can ensure that refugees do not remain in a state of significant hardship. Another approach would be to alleviate hardship in the country of origin. This would mean that the refugee could remain in, or return to, their original location. There is a case to be made that states also have an obligation to alleviate hardship in the country of origin in virtue of the same significant hardship that grounded the duty to give refuge.

Why should it fall to some states to alleviate hardship in others? This can be best answered using an analogy. Imagine that there is a child drowning in a swimming pool. One might think that one has an obligation to rescue the child in virtue of his or her significant hardship. However, if this were the case, then one would surely also think that one had an obligation to erect, or to campaign for the erection of, a child-proof fence to be placed around the pool so as to prevent future incidents of significant hardship. Here the obligation to rescue the drowning child is analogous to the obligation to give refuge to refugees and the obligation to erect the child-proof

fence is analogous to the obligation to alleviate hardship in the country of origin. The first set of obligations are designed to treat the symptoms of hardship. The second set of obligations are designed to prevent the symptoms of extreme hardship (a drowning child needing rescuing and a refugee finding the situation so severe in their country of origin that they need to seek refuge elsewhere).

Having established that hardship is morally significant, it would be very strange for states to be obligated to treat symptoms of hardship but not to prevent it. As such, I believe that we *prima facie* have reason to believe that this additional obligation to alleviate hardship in the country of origin exists in virtue of the significance of refugees' hardship. An interesting point of yet further research would be to delve deeper into an analysis of this obligation and to consider whether this obligation would be a perfect or imperfect duty. As such, an examination of this second obligation will be the focus of my future research.

§3. Concluding Remarks

In this dissertation I have argued that hardship is central to a moral definition of the term 'refugee'. Furthermore, it forms the basis of states' moral obligations to refugees. Persecution is currently the central concept in the legal definition of the term 'refugee' and states' legal obligations are not centered upon the idea of hardship. This has created a significant gap between what is moral and what is legal in relation to refugees.

I suggest that if we are to attempt to have a moral outlook overseeing the international response to the current refugee crisis and refugee issues more broadly, then we need to consider the gap between the moral and the legal perceptions of refugee issues highlighted by this paper. Hardship's central role needs to be recognized.

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